No. 16-529

Title:	Charles R. Kokesh, Petitioner v. Securities and Exchange Commission
Docketed:	October 19, 2016
Lower Ct:	United States Court of Appeals for the Tenth Circuit
Case Nos.:	(15-2087)
Decision Date:	August 23, 2016

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Oct 18 2016	Petition for a writ of certiorari filed. (Response due November 18, 2016)
Nov 10 2016	Order extending time to file response to petition to and including December 19, 2016.
Nov 18 2016	Brief amicus curiae of Chamber of Commerce of the United States of America filed.
Dec 9 2016	Brief of respondent Securities and Exchange Commission filed.
Dec 15 2016	Reply of petitioner Charles R. Kokesh filed.
Dec 21 2016	DISTRIBUTED for Conference of January 6, 2017.
Jan 9 2017	DISTRIBUTED for Conference of January 13, 2017.
Jan 13 2017	Petition GRANTED.
Feb 13 2017	Motion to dispense with printing the joint appendix filed by petitioner Charles R. Kokesh.
Feb 17 2017	SET FOR ARGUMENT ON Tuesday, April 18, 2017.
Feb 21 2017	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Feb 22 2017	Record requested from the U.S.C.A. 10th Circuit.
Feb 24 2017	Brief of petitioner Charles R. Kokesh filed.
Feb 27 2017	Record received from the U.S.C.A. 10th Circuit. The record is electronic and available on PACER.
Mar 3 2017	Brief amicus curiae of Mark Cuban filed.
Mar 3 2017	Brief amicus curiae of Securities Industry and Financial Markets Association filed.
Mar 3 2017	Brief amicus curiae of American Investment Council filed.
Mar 3 2017	Brief amicus curiae of Chamber of Commerce of the United States of America, and the American Petroleum Institute filed.
Mar 3 2017	Brief amicus curiae of The Cato Institute filed.
Mar 3 2017	Brief amicus curiae of Washington Legal Foundation filed.
Mar 3 2017	Brief amicus curiae of Donald R. Miller, Jr., in His Capacity as the Independent Executor of the Will and Estate of Charles J. Wyly, Jr. filed.
Mar 3 2017	Brief amicus curiae of Americans for Forfeiture Reform filed.
Mar 22 2017	CIRCULATED.
Mar 27 2017	Brief of respondent Securities and Exchange Commission filed. (Distributed)
Apr 10 2017	Reply of petitioner Charles R. Kokesh filed. (Distributed)
Apr 18 2017	Argued. For petitioner: Adam Unikowsky, Washington, D. C. For respondent: Elaine J. Goldenberg, Assistant to the Solicitor General, Department of Justice, Washington, D. C.
Jun 5 2017	Judgment REVERSED. Sotomayor, J., delivered the opinion for a unanimous Court.

Jul 7 2017 JUDGMENT ISSUED.

~~Name~~~~~~~~~~~~~~~~~~~~~~	~~~~~~~Address~~~~~~~~~~~~~~~~~~~	~~Phone~~~
Attorneys for Petitioner:		
Adam G. Unikowsky Counsel of Record	Jenner & Block, LLP 1099 New York Avenue, NW, Suite 900 Washington, DC 20001-4412 aunikowsky@jenner.com	(202) 639-6000
Party name: Charles R. Kokesh		
Attorneys for Respondent:		
Jeffrey B. Wall Counsel of Record	Acting Solicitor General United States Department of Justice 950 Pennsylvania Avenue, N.W. Washington, DC 20530-0001 SupremeCtBriefs@USDOJ.gov	(202) 514-2217
Party name: Securities and Exchange Commission		
Elaine J. Goldenberg	Assistant to the Solicitor General Department of Justice Washington, DC 20530	
Party name: Securities and Exchange Commission		
Other:		
Stephen Andrew Best	Brown Rudnick, LLP 601 Thirteenth Street, NW Washington, DC 20005 sbest@brownrudnick.com	(202) 536-1700
Party name: Mark Cuban		
Michael J. Dell	Kramer Levin Naftalis & Frankel LLP 1177 Avenue of the Americas New York, NY 10036 mdell@kramerlevin.com	(212) 715-9100
Party name: Securities Industry and Financial Markets Association		
Lewis J. Liman	Cleary Gottlieb Steen & Hamilton LLP One Liberty Plaza New York, NY 10006-1470 llimon@cgsh.com	(212) 225-2000
Party name: American Investment Council		
Matthew T. Martens	Wilmer Cutler Pickering Hale and Dorr, LLP 1875 Pennsylvania Avenue, NW Washington, DC 20006 matthew.martens@wilmerhale.com	(202) 663-6000
Party name: Chamber of Commerce of the United States of America, and The American Petroleum Institute		

Mark A. Perry
Gibson Dunn & Crutcher LLP
1050 Connecticut Ave., N.W.
Washington, DC 20036-5306
mperry@gibsondunn.com
(202) 955-8500
Party name: The Cato Institute

Richard A. Samp
Washington Legal Foundation
2009 Massachusetts Avenue, N.W.
Washington, DC 20036
rsamp@wlf.org
(202) 588-0302
Party name: Washington Legal Foundation

Mahesha P. Subbaraman
Subbaraman PLLC
222 S. 9th Street
Suite 1600
Minneapolis, MN 55402
mps@subblaw.com
(612) 315-9210
Party name: Americans for Forfeiture Reform

Kathleen M. Sullivan
Quinn Emanuel Urquhart & Sullivan, LLP
51 Madison Ave., 22nd Floor
New York, NY 10010
kathleensullivan@quinnemanuel.com
(212) 849-7000
Party name: Donald R. Miller, Jr., in His Capacity as the Independent Executor of the Will and Estate of Charles J. Wyly, Jr.

AND
BRIEFS

16-529

No. _____

IN THE
Supreme Court of the United States

CHARLES R. KOKESH,
Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

CLINTON W. MARRS
MARRS GRIEBEL LAW, LTD.
1000 Gold Ave, SW
Albuquerque, NM 87102
(505) 433-3926
clinton@marrslegal.com

ADAM G. UNIKOWSKY
Counsel of Record
ZACHARY C. SCHAUF
JENNER & BLOCK LLP
1099 New York Ave., NW,
Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

QUESTION PRESENTED

Under 28 U.S.C. § 2462, any "action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued."

The question presented is:

Does the five-year statute of limitations in 28 U.S.C. § 2462 apply to claims for "disgorgement"?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

INTRODUCTION 1

STATEMENT OF THE CASE 3

A. Petitioner's Securities-Law Violations 3

B. The District Court's Disgorgement Judgment 5

C. The Tenth Circuit's Opinion 7

REASONS FOR GRANTING THE WRIT 9

I. THERE IS AN ACKNOWLEDGED CIRCUIT SPLIT ON THE QUESTION PRESENTED. 9

A. The Eleventh Circuit Has Held That Section 2462 Applies to Claims for Disgorgement. 9

B. The First Circuit, D.C. Circuit, and Tenth Circuit Have Held That Section 2462 Does Not Apply to Claims for Disgorgement. 12

II. THIS CASE IS WORTHY OF THIS COURT'S REVIEW. 14

A. The Question Presented Is Important 14

B. This Court Should Resolve the Circuit Split. 19

C. This Case Is a Perfect Vehicle 21

III. THE TENTH CIRCUIT'S OPINION IS WRONG 23

CONCLUSION 27

Appendix A

SEC v. Kokesh, No. 15-2087, 2016 WL 4437585 (10th Cir. Aug. 23, 2016) 1a

Appendix B

SEC v. Kokesh, No. 09-cv-1021 (D.N.M. Mar. 30, 2015) 20a

TABLE OF AUTHORITIES

CASES

FTC v. Bronson Partners, LLC, 654 F.3d 359 (2d Cir. 2011) 25

Gabelli v. SEC, 133 S. Ct. 1216 (2013) 1, 2, 5, 14, 18, 26

Great-West Life & Annuity Insurance Co. v. Knudson, 534 U.S. 204 (2002) 25

Luis v. United States, 136 S. Ct. 1083 (2016) 21

Molina-Martinez v. United States, 136 S. Ct. 1338 (2016) 21

Nichols v. United States, 136 S. Ct. 1113 (2016) 21

Ocasio v. United States, 136 S. Ct. 1423 (2016) 20

Official Committee of Unsecured Creditors of WorldCom, Inc. v. SEC, 467 F.3d 73 (2d Cir. 2006) 25

Riordan v. SEC, 627 F.3d 1230 (D.C. Cir. 2010) 2, 8, 13

SEC v. Amerindo Investment Advisors, 639 F. App'x 752 (2d Cir. 2016) 19

SEC v. Battoo, 158 F. Supp. 3d 676 (N.D. Ill. 2016) 19

SEC v. Collyard, 154 F. Supp. 3d 781 (D. Minn. 2015), *appeal docketed*, No. 16-1405 (8th Cir. Feb. 17, 2016) 14, 19

SEC v. Contorinis, 743 F.3d 296 (2d Cir. 2014) 15, 22, 26

SEC v. Drexel Burnham Lambert Inc., 837 F. Supp. 587 (S.D.N.Y. 1993) 15

SEC v. First Jersey Securities, Inc., 101 F.3d 1450 (2d Cir. 1996) 15

SEC v. First Pacific Bancorp, 142 F.3d 1186 (9th Cir. 1998) 15

SEC v. Fischbach Corp., 133 F.3d 170 (2d Cir. 1997) 25

SEC v. Geswein, 2 F. Supp. 3d 1074 (N.D. Ohio 2014) 17

SEC v. Graham, 21 F. Supp. 3d 1300 (S.D. Fla. 2014) 5, 14

SEC v. Graham, 823 F.3d 1357 (11th Cir. 2016) 2, 9, 10, 11, 12, 19, 23

SEC v. Johnson, 650 F.3d 710 (D.C. Cir. 2011) 21

SEC v. Jones, 155 F. Supp. 3d 1180 (D. Utah 2015) 19

SEC v. Jones, 476 F. Supp. 2d 374 (S.D.N.Y. 2007) 14

SEC v. Mercury Interactive, LLC, No. C 07-2822 JF (RS), 2009 WL 2984769 (N.D. Cal. Sept. 15, 2009) 17

SEC v. Pardue, 367 F. Supp. 2d 773 (E.D. Pa. 2005) 15

SEC v. Quan, 817 F.3d 583 (8th Cir. 2016) ... 15, 22, 25

SEC v. Rosenthal, 426 F. App'x 1 (2d Cir. 2011) 15, 22

SEC v. Saltsman, No. 07-CV-4370 (NGG) (RML), 2016 WL 4136829 (E.D.N.Y. Aug. 2, 2016) 14, 19

SEC v. Stoecklien, No. 15CV0532 JAH WVG, 2015 WL 6455602 (S.D. Cal. Oct. 26, 2015) 19

SEC v. Strebinger, 114 F. Supp. 3d 1321 (N.D. Ga. 2015) 19

SEC v. Tambone, 550 F.3d 106 (1st Cir. 2008) 2, 8, 12, 13

SEC v. Tambone, 573 F.3d 54 (1st Cir. 2009) 13

SEC v. Tambone, 597 F.3d 436 (1st Cir. 2010) 13

SEC v. Teo, 746 F.3d 90 (3d Cir. 2014) 16

SEC v. Wealth Strategy Partners, LC, No. 8:14-CV-02427-T, 2015 WL 3603621 (M.D. Fla. June 5, 2015) 19

SEC v. Whittemore, 659 F.3d 1 (D.C. Cir. 2011) 16

SEC v. Wyly, 56 F. Supp. 3d 394 (S.D.N.Y. 2014) 17

Taylor v. United States, 136 S. Ct. 2074 (2016) 21

United States v. EME Homer City Generation, L.P., 727 F.3d 274 (3d Cir. 2013) 14

United States v. Ursery, 518 U.S. 267 (1996) 11, 23

Upton v. SEC, 75 F.3d 92 (2d Cir. 1996) 19

STATUTES

15 U.S.C. § 77v(a) 21
15 U.S.C. § 78m 5
15 U.S.C. § 78n 5
15 U.S.C. § 78aa 21
15 U.S.C. § 80a-36 5
15 U.S.C. § 80b-5 5
15 U.S.C. § 80b-6(1) 5
15 U.S.C. § 80b-6(2) 5
15 U.S.C. § 80b-14(a) 21
28 U.S.C. § 1254(1) 1
28 U.S.C. § 2462 ..... *passim*

OTHER AUTHORITIES

Brief for SEC, *Gabelli v. SEC*, 133 S. Ct. 1216 (2013) (No. 11-1274), 2012 WL 613633 20

Brief of SEC, *Graham, SEC v. Graham*, 823 F.3d 1357 (11th Cir. 2016) (No. 14-13562-E), 2014 WL 6844558 20

Richard L. Cassin, *VimpelCom FCPA disgorgement is third biggest ever*, FCPA Blog (Feb. 23, 2016, 7:28 a.m.), http://www.fcpablog.com/blog/2016/2/23/vimpelcom-fcpa-disgorgement-is-third-biggest-ever.html 17

SEC, Select SEC and Market Data, Fiscal 2015, https://www.sec.gov/reportspubs/select-sec-and-market-data/secstats2015.pdf 15, 16, 17

SEC, Select SEC and Market Data, Fiscal 2011, https://www.sec.gov/reportspubs/select-sec-and-market-data/secstats2011.pdf 16

U.S. Dep't of Justice, Press Release, *Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines* (Dec. 15, 2008), https://www.justice.gov/archive/opa/pr/2008/December/08-crm-1105.html 17

Mary Jo White, Chair, SEC, Speech at Sandler O'Neill Partners, L.P. Global Exchange and Brokerage Conference: Enhancing Our Equity Market Structure (June 5, 2014), http://www.sec.gov/News/Speech/Detail/Speech/1370542004312 19

PETITION FOR WRIT OF CERTIORARI

Charles R. Kokesh petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The decision of the Tenth Circuit (Pet. App. 1a–19a) is not yet reported in the Federal Reporter, but is available at 2016 WL 4437585. The decision of the District Court (Pet. App. 20a–47a) is unreported.

JURISDICTION

The judgment of the Tenth Circuit was entered on August 23, 2016. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2462 provides:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

INTRODUCTION

Under 28 U.S.C. § 2462, a five-year statute of limitations applies to "any action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture." In *Gabelli v. SEC*, 133 S. Ct. 1216 (2013), this Court

held that § 2462 applies with full force to SEC claims for money penalties, unanimously rejecting the SEC's request for a "discovery rule" that "would leave defendants exposed to Government enforcement action not only for five years after their misdeeds, but for an additional uncertain period into the future." *Id.* at 1223. The Court, however, expressly reserved the question of whether § 2462 applies to claims for "disgorgement." *Id.* at 1220 n.1.

That question is now the subject of an acknowledged split among the courts of appeals. The Eleventh Circuit has held that "§ 2462's statute of limitations applies to disgorgement," finding that disgorgement is a "forfeiture" within the meaning of the statute. *SEC v. Graham*, 823 F.3d 1357, 1363 (11th Cir. 2016). By contrast, the First and D.C. Circuits—and, in the opinion below, the Tenth Circuit—have held that § 2462 does not apply to actions for disgorgement. *See SEC v. Tambone*, 550 F.3d 106, 148 (1st Cir. 2008); *Riordan v. SEC*, 627 F.3d 1230, 1234 (D.C. Cir. 2010); Pet. App. 1a–19a.

This case squarely presents the issue that has divided the circuits. The SEC did not bring its disgorgement claims against Petitioner until 2009, yet the district court entered a $34.9 million disgorgement order based on securities-law violations that occurred as far back as 1995. Pet. App. 3a, 21a. In the Eleventh Circuit, all the SEC's claims that arose before 2004 would be untimely under § 2462, and the SEC has conceded that this rule would preclude all but $5 million of the disgorgement order against Petitioner. Pet. App. 26a–27a. In the decision below, however, the

Tenth Circuit expressly disagreed with the Eleventh Circuit and followed the contrary decisions of the First and D.C. Circuits, holding that disgorgement orders are "not subject to § 2462." Pet. App. 2a.

This Court should grant certiorari to resolve the conflict. The question presented recurs frequently, and it is important. *Gabelli* set a clear limitations rule for money penalties. But today, it is uncertain whether that limit applies to disgorgement—or whether instead, the SEC can reach back to punish violations as far back as it chooses to look, so long as it captions its claims "disgorgement." The SEC has exploited that uncertainty. In 2015 alone, the SEC extracted $3 billion in disgorgement payments. That amount dwarfs the SEC's money penalties, which were just $1.2 billion, and is also growing faster: Disgorgement collections have jumped 60% since 2011, compared with just a quarter increase in penalties. The SEC's increasing post-*Gabelli* reliance on disgorgement calls out for this Court's review to determine whether disgorgement claims are exempt from the statute of limitations that applied in *Gabelli*, as the First, Tenth, and D.C. Circuits have held, or subject to that same limit, as the Eleventh Circuit has concluded.

STATEMENT OF THE CASE

A. Petitioner's Securities-Law Violations

On October 27, 2009, the SEC filed a civil enforcement action alleging that, from 1995 through 2006, Petitioner violated federal securities laws by misappropriating funds. Pet. App. 3a, 21a. The SEC's claims concerned two SEC-registered investment-

adviser firms—Technology Funding Ltd. ("TFL") and Technology Funding, Inc. ("TFI")—that contracted to provide investment advice to four SEC-registered business-development companies ("the Funds"). Pet. App. 2a–3a. The SEC alleged that, via TFL and TFI, Petitioner caused improper distributions to be made from the Funds. Pet. App. 21a.

A jury found that Petitioner contravened the securities laws, based on three violations. Pet. App. 4a–5a. First, from 1995 through 2006, Petitioner directed the treasurer of TFL and TFI to withdraw $23.8 million from the Funds to pay salaries and bonuses to officers of TFL and TFI, including both Petitioner and others. Pet. App. 3a, 22a. The contracts did not provide for bonus payments, and the bonuses were not reported in SEC filings. Pet. App. 3a–4a. Until 2000, the contracts also prohibited payments for the salaries of Petitioner and other officers, and the 2000 contract amendment to permit such payments was based on a misleading proxy statement. *Id.*

Second, from 1995 through 2006, Petitioner directed the treasurer of TFL and TFI to withdraw $5 million to cover office rent, which was paid to the landlords of TFL and TFI. Pet. App. 3a, 22a. The contracts prohibited rent reimbursement. Pet. App. 4a.

Third, in 2000, Petitioner caused TFL and TFI to take $6.1 million in "tax distributions." Pet. App. 3a–4a. The contracts imposed specific conditions on payments for tax distributions, which these payments did not satisfy. Pet. App. 3a–4a, 23a. These payments went both to Petitioner and others. *Id.*

Based on these improper distributions, the jury found Petitioner had violated the Investment Company Act of 1940, 15 U.S.C. § 80a-36, and that he had aided and abetted TFL and TFI in violating the Investment Advisers Act, 15 U.S.C. §§ 80b-5, 80b-6(1)-(2), and the Exchange Act of 1934, 15 U.S.C. §§ 78m, 78n, and its implementing regulations. Pet. App. 23a–24a.

B. The District Court's Disgorgement Judgment

After the jury's verdict, the SEC moved for entry of judgment. It asked the district court to impose a civil monetary penalty of $5 million and "disgorgement" of $34.9 million. Pet. App. 27a, 33a.

As to the penalty, it was common ground that the five-year limitations period in 28 U.S.C. § 2462 applied to bar any claim that "first accrued" before October 27, 2004—five years before the SEC's complaint. Pet. App. 26a; *see Gabelli*, 133 S. Ct. at 1220–21. The district court found that some, but not all, of the SEC's claims accrued after October 27, 2004. Pet. App. 28a. It ordered Petitioner to pay a money penalty of $2.4 million, equal to "the amount of funds that [Petitioner] himself received during the limitations period." Pet. App. 31a–32a.

Petitioner argued that § 2462 also applied to the SEC's claim for disgorgement, pointing to the district court's decision in *SEC v. Graham*, 21 F. Supp. 3d 1300 (S.D. Fla. 2014). Pet. App. 33a. The *Graham* district court had held that "disgorgement ... can truly be regarded as nothing other than a forfeiture ..., which remedy is expressly covered by § 2462." 21 F. Supp. 3d at 1310–11; *see* Pet. App. 34a. The district court below,

however, found that Tenth Circuit precedent foreclosed this argument. Pet. App. 36a.

The district court ordered Petitioner to disgorge $34.9 million, which it found "reasonably approximates the ill-gotten gains causally connected to [his] violations." Pet. App. 45a. Much of this amount concededly was based on violations "outside the five-year window" in § 2462. Pet. App. 42a; *see* Dkt. 181 at 2 (SEC's concession that $29.9 million in misappropriations occurred "[b]efore the limitations period").[1]

Much of the disgorgement amount concededly reflected "funds paid to third parties," including "landlords or other ... persons to whom [Petitioner] was not related." Pet. App. 42a; *see* Dkt. 181 at 2 (SEC's calculation that at least $17.6 million did not go to Petitioner). And this amount concededly was far greater than Petitioner could possibly "disgorge"—Petitioner no longer had even the funds that he had received, and he was "insolvent," with "no prospect of recovering from insolvency" or paying the SEC's requested disgorgement judgment. Pet. App. 31a; *see* Pet. App. 12a–13a; Dkt. 180 at 3, ¶ 11. Nonetheless, the district court ordered Petitioner to disgorge $34.9 million, plus an additional $18 million in prejudgment interest. Pet. App. 45.

---

[1] All citations to "Dkt." are to the District Court docket at *SEC v. Kokesh*, No. 1:09-cv-01021-SMV-LAM (D.N.M.). All materials cited in this petition are available on PACER.

C. The Tenth Circuit's Opinion

Petitioner appealed, renewing his argument that § 2462 barred the SEC's disgorgement claims that "accrued more than five years before the SEC brought its action." Pet. App. 5a.

The Tenth Circuit affirmed. The court acknowledged that § 2462 "sets a five-year limitations period for claims seeking certain sanctions," including "'any civil ... penalty, or forfeiture.'" Pet. App. 5a–6a (quoting 28 U.S.C. § 2462). The Tenth Circuit held, however, that a disgorgement order is not "a penalty or forfeiture within the meaning of § 2462." Pet. App. 5a–6a, 19a.

First, the Tenth Circuit held that "disgorgement is not a penalty under § 2462 because" it "does not inflict punishment" but rather "is remedial." Pet. App. 10a–11a. While the Tenth Circuit acknowledged that "disgorgement serves a deterrent purpose," the court found that disgorgement does not amount to punishment because "it does so ... by depriving the wrongdoer of the benefits of wrongdoing." Pet. App. 11a.

Next, the Tenth Circuit addressed Petitioner's argument "that disgorgement is a 'forfeiture.'" Pet. App. 13a. The court acknowledged that "in common English the words *forfeit* and *disgorge* ... capture similar concepts," and that the "definitions in the leading legal dictionary ... also have similarities": Black's defines "disgorgement" as a "legal compulsion" to "'giv[e] up something (such as profits illegally obtained),'" and "forfeiture" as the "'loss of ... property

because of a crime, breach of obligation, or neglect of duty.'" Pet. App. 13a (quoting *Black's Law Dictionary* 568, 765 (10th ed. 2014)). Likewise, the court acknowledged that "the Eleventh Circuit recently held that disgorgement is a forfeiture under § 2462," affirming the district court's similar conclusion. Pet. App. 13a (citing *Graham*, 823 F.3d at 1363–64).

Nonetheless, the court noted that "[o]ther circuits have a different view" than the Eleventh, citing the D.C. Circuit's decision in *Riordan v. SEC*, 627 F.3d 1230, 1234 (D.C. Cir. 2010), and the First Circuit's decision in *SEC v. Tambone*, 550 F.3d 106, 148 (1st Cir. 2008). Pet. App. 13a. The Tenth Circuit joined this latter side of the split, stating that "[r]espectfully, we also see things a bit differently" than the Eleventh Circuit. Pet. App. 14a.

The Tenth Circuit believed that § 2462 used "forfeiture" in a "narrow" "historical sense"—as "an in rem procedure to take 'tangible property used in criminal activity.'" Pet. App. 14a. It reasoned that "[w]hen the term *forfeiture* is linked in § 2462 to the undoubtedly punitive actions for a *civil fine* or *penalty*, ... Congress was contemplating the meaning of *forfeiture* in this historical sense." Pet. App. 14a–15a. And the court found that the "nonpunitive remedy of disgorgement does not fit in that company." Pet. App. 15a. The court acknowledged that many modern statutes use the term "forfeiture" more broadly, to include "disgorgement-type remedies" like orders to repay amounts reflecting the "proceeds of illegal" activity. *Id.* But the court deemed these statutes irrelevant because they occurred "after § 2462 was

enacted" and "should not expand the meaning of the word forfeiture in § 2462 to encompass traditional disgorgement remedies." Pet. App. 15a–16a.

The court therefore held that "disgorgement order[s] ... are ... no[t] forfeitures under § 2462." Pet. App. 16a–17a.

REASONS FOR GRANTING THE WRIT

This case presents an ideal vehicle to resolve a circuit split on an important question of federal law. As the Tenth Circuit acknowledged, its decision is consistent with the decisions of two other circuits, but conflicts with *SEC v. Graham*, 823 F.3d 1357, 1363–64 (11th Cir. 2016). That disagreement is outcome-determinative: In the Eleventh Circuit, § 2462 would have precluded most of the $34.9 million forfeiture judgment that the Tenth Circuit, applying a different rule, affirmed. And the disagreement is important: The question presented recurs frequently, and billions of dollars in potential liability, stretching back decades, turn on it. Only this Court can restore national uniformity, and this case is a perfect vehicle to do so. The Court should grant certiorari.

I. THERE IS AN ACKNOWLEDGED CIRCUIT SPLIT ON THE QUESTION PRESENTED.

A. The Eleventh Circuit Has Held That Section 2462 Applies to Claims for Disgorgement.

In *SEC v. Graham*, 823 F.3d 1357 (11th Cir. 2016), the Eleventh Circuit considered the same question as the Tenth Circuit below. The SEC filed disgorgement

claims in 2013 based on alleged securities-law violations in 2004 through 2008, and the issue was whether § 2462 applied to bar disgorgement claims outside that statute's five-year limitations period. *Id.* at 1359.

The Eleventh Circuit held that "§ 2462's statute of limitations applies to disgorgement," affirming the district court's similar holding and rendering the SEC's claims untimely. *Id.* at 1363. Section 2462, the Eleventh Circuit noted, applies to any action seeking a "forfeiture." *Id.* And "for the purposes of § 2462," the Eleventh Circuit concluded, "forfeiture and disgorgement are effectively synonyms." *Id.*

The Eleventh Circuit looked to these terms' "ordinary meaning." *Id.* Webster's, the court observed, "defines forfeiture as 'the divesting of the ownership of particular property of a person on account of the breach of a legal duty.'" *Id.* (quoting Forfeiture, *Webster's Third New Int'l Dictionary* (2002)). Similarly, the Oxford English Dictionary defines forfeiture as "[t]he fact of losing or becoming liable to deprivation of (an estate, goods, life, an office, right, etc.) in consequence of a crime, offence, or breach of engagement." *Id.* (quoting Forfeiture, *Oxford English Dictionary* (2d ed. 1989)). These definitions, the court found, "illustrate that forfeiture occurs when a person is forced to turn over money or property because of a crime or wrongdoing." *Id.*

The Eleventh Circuit found "no meaningful difference in the definitions of disgorgement and forfeiture." *Id.* "Black's Law Dictionary," the court explained, "defines disgorgement as '[t]he act of giving up something (such as profits illegally obtained) on

demand or by legal compulsion,'" and provides "a very similar definition for forfeiture," which Black's defines as "'[t]he loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty.'" *Id.* (quoting Disgorgement, Forfeiture, *Black's Law Dictionary* (10th ed. 2014)). Indeed, the Eleventh Circuit noted, "[t]he Supreme Court, too, has used the terms interchangeably." *Id.* In *United States v. Ursery*, 518 U.S. 267 (1996), this Court explained that forfeitures "are designed primarily to confiscate property used in violation of the law, and to require disgorgement of the fruits of illegal conduct." *Id.* at 284.

The Eleventh Circuit therefore "conclude[d] that for the purposes of § 2462 the remedy of disgorgement is a 'forfeiture,' and § 2462's statute of limitations applies." *Graham*, 823 F.3d at 1363.

The Eleventh Circuit considered and rejected the SEC's argument that "disgorgement cannot be forfeiture because the two terms refer to ... different things" in their "technical definitions." *Id.* at 1363–64; *see id.* (SEC's argument that "disgorgement only includes direct proceeds from wrongdoing, whereas forfeiture can include both ill-gotten gains and any additional profit earned on those ill-gotten gains"). To begin, the Eleventh Circuit observed that even "under the definitions the SEC puts forth, disgorgement is imposed as redress for wrongdoing and can be considered a subset of forfeiture." *Id.* at 1364. More fundamentally, the Eleventh Circuit found "no indication that in enacting § 2462's widely applicable statute of limitations, Congress meant to adopt the

technical definitions ... the SEC urges over the words' ordinary meanings." *Id.* Indeed, the presumption is the opposite—that "words in statutes should be given their ordinary, popular meaning unless Congress clearly meant the words in some more technical sense.'" *Id.* (quoting *United States v. Nat'l Broiler Mktg. Ass'n*, 550 F.2d 1380, 1386 (5th Cir. 1977), *aff'd*, 436 U.S. 816 (1978)).

Accordingly, the Eleventh Circuit held that "§ 2462 applies to ... disgorgement." *Id.*

B. The First Circuit, D.C. Circuit, and Tenth Circuit Have Held That Section 2462 Does Not Apply to Claims for Disgorgement.

The Circuits are now in express disagreement over whether § 2462's limitations period applies to disgorgement. While the Eleventh Circuit has answered that question in the affirmative, the First Circuit, D.C. Circuit, and Tenth Circuit have held the opposite.

First Circuit. The First Circuit considered whether § 2462 applies to an SEC claim for disgorgement in *SEC v. Tambone*, 550 F.3d 106 (1st Cir. 2008). There, the SEC filed suit in 2005, but sought disgorgement based on alleged violations dating back to 1998, which would be untimely under § 2462's five-year limitation period. *Id.* at 115–16. The First Circuit, however, held that § 2462 "applies only to penalties sought by the SEC, not its request for ... disgorgement." *Id.* at 148. Accordingly, the First Circuit found that the claims for "disgorgement ... are not barred" by "the applicable five-year statute of

limitations" under § 2462. *Id.*[2]

D.C. Circuit. In *Riordan v. SEC*, 627 F.3d 1230 (D.C. Cir. 2010), the SEC filed its action in 2007 but sought divestiture based on "wrongdoing that took place before ... 2002." *Id.* at 1234. The "key question" for the D.C. Circuit, as for the Tenth Circuit below, was whether the "five-year statute of limitations in 28 U.S.C. § 2462 applies to an action for ... disgorgement." *Id.* That court "said no." *Id.* The D.C. Circuit had previously held that disgorgement orders are not "penalties" under § 2462. *Id.* (citing *Zacharias v. SEC*, 569 F.3d 458, 471–72 (D.C. Cir. 2009)). The court acknowledged the argument that "disgorgement is a kind of forfeiture covered by § 2462." *Id.* at 1234 n.1. But the court found that its precedent "at least implicitly rejects that argument and [wa]s binding on ... a three-judge panel." *Id.*

Tenth Circuit. As just explained, the Tenth Circuit below held that disgorgement claims are "not subject to § 2462." Pet. App. 2a. It expressly disagreed with the Eleventh Circuit's contrary holding and instead

---

[2] The First Circuit granted en banc review in *Tambone* and withdrew the panel opinion, but the en banc court limited its review to a different issue. *See SEC v. Tambone*, 573 F.3d 54 (1st Cir. 2009). The en banc court's subsequent opinion confined itself to that issue and expressly reinstated the panel's opinion on issues that the en banc court did not reach. *SEC v. Tambone*, 597 F.3d 436, 450 (1st Cir. 2010). The en banc court held that certain of the SEC's claims could proceed, including claims seeking disgorgement, and the panel's rejection of the defendants' limitations argument was necessary to that judgment. *Id.*; *see Tambone*, 550 F.3d at 117, 148.

followed the decisions of the First and D.C. Circuits. Pet. App. 12a–13a.[3]

II. THIS CASE IS WORTHY OF THIS COURT'S REVIEW.

This case meets all of the Court's criteria for granting certiorari. First, the question presented is important. Second, the question presented concerns an intractable and developed circuit split on a recurring question that only this Court can resolve. Third, this case is a flawless vehicle.

A. The Question Presented Is Important.

The question presented is critical to the fair and uniform enforcement of the Nation's securities laws.

As the Court observed in *Gabelli*, § 2462 is not "specific ... to securities law; it governs many penalty provisions throughout the U.S. Code." 133 S. Ct. at 1219; *see also, e.g., United States v. EME Homer City Generation, L.P.*, 727 F.3d 274, 282 n.9, 296 (3d Cir. 2013) (noting that § 2462 applies to enforcement actions under Clean Air Act). All of the reported cases on the question presented, however, have arisen in the context of SEC enforcement actions, and it is in that context that the question is of greatest practical significance.

---

[3] District courts are also in conflict over the question presented. *Compare Graham*, 21 F. Supp. 3d at 1308–11 (§ 2462 applies to disgorgement), *with, e.g., SEC v. Saltsman*, No. 07-CV-4370 (NGG) (RML), 2016 WL 4136829, at *24–29 (E.D.N.Y. Aug. 2, 2016); *SEC v. Collyard*, 154 F. Supp. 3d 781, 792 (D. Minn. 2015) (opposite), *appeal docketed*, No. 16-1405 (8th Cir. Feb. 17, 2016); *SEC v. Jones*, 476 F. Supp. 2d 374, 385 (S.D.N.Y. 2007).

Disgorgement has become a ubiquitous remedy in SEC enforcement actions. Every year, the SEC brings hundreds of enforcement actions—807 in 2015 alone. *See* SEC, Select SEC and Market Data, Fiscal 2015, at 3, https://www.sec.gov/reportspubs/select-sec-and-market-data/secstats2015.pdf ("SEC 2015 Data").

In virtually all of them, the SEC includes a claim for disgorgement. *See, e.g.*, *SEC v. Pardue*, 367 F. Supp. 2d 773, 778 (E.D. Pa. 2005) ("Disgorgement has become the routine remedy for a securities enforcement action."); *SEC v. Drexel Burnham Lambert Inc.*, 837 F. Supp. 587, 611 (S.D.N.Y. 1993) ("Disgorgement is one of the most common forms of ancillary relief granted in SEC enforcement actions ....").

In addition to being common, disgorgement is also a potent remedy. For example, courts have held that the SEC is not required to "trace[]" "specific assets ... back to a violation." *SEC v. Quan*, 817 F.3d 583, 594 (8th Cir. 2016); *see SEC v. Rosenthal*, 426 F. App'x 1, 3 (2d Cir. 2011). Indeed, defendants can be required to "disgorge" funds that they "never possessed," but that instead went to employers, co-workers, or unrelated "third parties" like landlords. *SEC v. Contorinis*, 743 F.3d 296, 300, 307 (2d. Cir. 2014) (affirming disgorgement of $7.2 million despite "personal profit" of only $427,875); Pet. App. 11a–12a, 42a–43a; *see also SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1475 (2d Cir. 1996). Even if the defendant himself "ultimately ... lost" money, still disgorgement may be ordered. *SEC v. First Pac. Bancorp*, 142 F.3d 1186, 1192 & n.6 (9th Cir. 1998). Courts have even required disgorgement when the actual "cause of all the[] profits" was not any

securities-law violation, but rather an "intervening cause" that was linked to the violation only by "dumb luck"—so long as the courts determine that the "deterrent impact" of this sanction will "further[] future compliance." *See SEC v. Teo*, 746 F.3d 90, 108–09 (3d Cir. 2014) (defendants failed to fully report stock holdings, but all profit was due to an unrelated tender offer that increased the stock price). Even on evidentiary matters, the SEC receives the benefit of every doubt: The amount of disgorgement need not be proven, but rather can be only a "reasonable approximation of profits causally connected to the violation." *SEC v. Whittemore*, 659 F.3d 1, 7 (D.C. Cir. 2011) (quoting *SEC v. First City Fin. Corp., Ltd.*, 101 F.3d 1215, 1231 (D.C. Cir. 1989)).

In the years since *Gabelli*, the SEC has increasingly relied on disgorgement in order to maximize its recoveries: Disgorgement payments have jumped 60% since 2011, as against only a 25% rise in penalties.[4] And the SEC's frequent and aggressive use of the disgorgement remedy has allowed it to collect enormous sums. In 2015 alone, for example, the SEC collected $3 billion in disgorgement payments. SEC 2015 Data at 2. Single cases routinely yield tens or even hundreds of millions of dollars: Under the Foreign Corrupt Practices Act alone, there have been six disgorgement awards over $100 million since 2008,

---

[4] *Compare* SEC 2015 Data at 2 (disgorgement of $3.019 billion and penalties of $1.175 billion), *with* SEC, Select SEC and Market Data, Fiscal 2011, at 2, https://www.sec.gov/reportspubs/select-sec-and-market-data/secstats2011.pdf (disgorgement of $1.878 billion and penalties of $928 million).

including a $350 million disgorgement award against Siemens.[5] The SEC's disgorgement collections have grown to dwarf its monetary penalties, which came to only $1.2 billion in 2015. SEC 2015 Data at 2.

The SEC routinely seeks disgorgement for violations dating well before the five-year limitations period in § 2462. Here, for example, the SEC sought to impose liability for violations that occurred 15 years before its complaint. Pet. App. 21a. And this case is no outlier. *See, e.g.*, *SEC v. Wyly*, 56 F. Supp. 3d 394, 411 (S.D.N.Y. 2014) (2010 complaint seeking disgorgement for violations dating to 1992); *SEC v. Geswein*, 2 F. Supp. 3d 1074, 1083 (N.D. Ohio 2014) (2010 complaint for violations dating to 1999); *SEC v. Mercury Interactive, LLC*, No. C 07-2822 JF (RS), 2009 WL 2984769, at *1 (N.D. Cal. Sept. 15, 2009) (2007 complaint for violations dating to 1997).

The question presented in this case is whether the SEC is entitled to pursue such stale disgorgement claims. Given how frequently the SEC pursues disgorgement and how powerful the disgorgement remedy has become, that question is of great practical importance. If § 2462 does not provide a statute of

---

[5] U.S. Dep't of Justice, Press Release, *Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines* (Dec. 15, 2008), https://www.justice.gov/archive/opa/pr/2008/December/08-crm-1105.html; *see* Richard L. Cassin, *VimpelCom FCPA disgorgement is third biggest ever*, FCPA Blog (Feb. 23, 2016, 7:28 a.m.), http://www.fcpablog.com/blog/2016/2/23/vimpelcom-fcpa-disgorgement-is-third-biggest-ever.html.

limitations for disgorgement actions, then this sweeping liability will also be limitless in time. Statutes of limitations aim to provide "security and stability to human affairs," reflecting the settled wisdom that it would be "'utterly repugnant to the genius of our laws'" if actions "could 'be brought at any distance of time.'" *Gabelli*, 133 S. Ct. at 1221, 1223 (quoting *Adams v. Woods*, 6U.S. (2 Cranch) 336, 342 (1805)). But if § 2462 does not apply to claims that the SEC denominates "disgorgement," this promise will be hollow. Every participant in the securities industry will be eternally at risk of being confronted with "stale claims" brought by the SEC decades after the alleged misconduct. *Id.* at 1221.

Such indefinite liability not only deprives participants of repose, but also risks inflicting grave unfairness on individuals whose ability to defend themselves may deteriorate with each passing year. Statutes of limitations "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Gabelli*, 133 S. Ct. at 1221 (quoting *R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348–49 (1944)). After a decade or more, the targets of the SEC's disgorgement claims may struggle to develop the evidence necessary to defend against the sweeping, but stale, liability the SEC seeks to impose. The potential for unfairness is particularly great given the SEC's penchant for condemning, after the fact, market practices that were widespread and even

known to the SEC at the time.[6]

The SEC's increasing post-*Gabelli* reliance on disgorgement calls out for this Court's review to determine whether disgorgement claims are exempt from the statute of limitations that applied in *Gabelli*, as the First, Tenth, and D.C. Circuits have held, or subject to that same limit, as the Eleventh Circuit has concluded.

B. This Court Should Resolve the Circuit Split.

This case merits the Court's review. The question presented is not just substantively important, but arises frequently: Since the start of 2015 alone, ten cases have addressed the question of whether § 2462 applies to disgorgement.[7]

---

[6] *See, e.g.*, Mary Jo White, Chair, SEC, Speech at Sandler O'Neill Partners, L.P. Global Exchange and Brokerage Conference: Enhancing Our Equity Market Structure (June 5, 2014), http://www.sec.gov/News/Speech/Detail/Speech/1370542004312 (promising stricter scrutiny of use of technology, high-speed trading, and alternative trading systems); *cf. Upton v. SEC*, 75 F.3d 92, 98 (2d Cir. 1996) (vacating censure because SEC knew about the practice in question before it occurred and did not condemn it).

[7] Pet. App. 16a–17a; *Saltsman*, 2016 WL 4136829, at *24; *Graham*, 823 F.3d at 1364; *SEC v. Amerindo Inv. Advisors*, 639 F. App'x 752, 754 (2d Cir. 2016); *SEC v. Battoo*, 158 F. Supp. 3d 676, 691 (N.D. Ill. 2016); *SEC v. Jones*, 155 F. Supp. 3d 1180, 1187 (D. Utah 2015); *Collyard*, 154 F. Supp. 3d at 791; *SEC v. Stoecklien*, No. 15CV0532 JAH WVG, 2015 WL 6455602, at *3 (S.D. Cal. Oct. 26, 2015); *SEC v. Strebinger*, 114 F. Supp. 3d 1321, 1328 n.6 (N.D. Ga. 2015); *SEC v. Wealth Strategy Partners, LC*, No. 8:14-CV-02427-T, 2015 WL 3603621, at *9 (M.D. Fla. June 5, 2015).

Only this Court can resolve the conflict of authority between the Eleventh Circuit and its sister circuits. There is no realistic possibility of the Eleventh Circuit reconsidering *Graham*: The unanimous panel decision in *Graham* came after the SEC appealed from a district court decision that also applied § 2462 to disgorgement, and after the SEC expressly urged the Eleventh Circuit to follow the D.C. Circuit's decision in *Riordan*. *See* Br. of SEC at 36–37, *Graham*, 2014 WL 6844558 (No. 14-13562-E). The SEC then declined to file a petition for rehearing en banc or a petition for certiorari. *See generally*, Docket, *SEC v. Graham*, No. 14-13562-E (11th Cir.). Thus, the circuit split will persist until this Court grants certiorari to resolve it.

There is no need for additional percolation. Four circuits, as well as numerous district courts, have considered whether § 2462 applies to claims for disgorgement, and the arguments on both sides of the split have been fully aired. Although the majority of circuits have sided with the government, the Eleventh Circuit's opinion rejecting the government's position is careful and correct. Indeed, this case is an even stronger certiorari candidate than *Gabelli* itself, in which only one circuit had adopted the position that this Court ultimately endorsed, and in an unpublished decision after the filing of the petition for certiorari. *See* Br. for SEC at 23–24, *Gabelli*, 2012 WL 613633 (No. 11-1274) (citing *SEC v. Bartek*, No. 11-10594, 2012 WL 3205446, at *3–6 (5th Cir. Aug. 7, 2012)). The Court routinely grants review in cases presenting 1-1 or 2-1 splits;[8] the Court should resolve the 3-1 split presented

---

[8] *See, e.g.*, *Ocasio v. United States*, 136 S. Ct. 1423 (2016) (1-1 split);

here as well, especially in light of the substantive importance of the question presented.

Finally, this Court's review is especially warranted because the circuit split creates the prospect of venue manipulation by the government. In securities cases, the SEC routinely has a choice of venue, which can be proper anywhere that the defendant resides or transacts business, or where the act or transaction constituting the violation occurred, or—in some cases—where any offer or sale linked to the violation took place. *SEC v. Johnson*, 650 F.3d 710, 714 (D.C. Cir. 2011); *see, e.g.*, 15 U.S.C. § 77v(a) (Securities Act); *id.* § 78aa (Securities Exchange Act); *id.* § 80b-14(a) (Investment Adviser Act). So, for example, if an alleged securities-law violator resides in Georgia, does business in the District of Columbia, and makes a sale constituting a violation of the securities laws in Denver, the SEC can avoid any statute of limitations by choosing to bring an action that would be governed by the more pro-government law of the D.C. or Tenth Circuits. The time for bringing a disgorgement claim, with the vast liability it can entail, should not turn on different interpretations of federal law in different jurisdictions. The Court should grant certiorari and resolve the issue nationwide.

C. This Case Is a Perfect Vehicle.

This case is an ideal vehicle. The Tenth Circuit

Nichols v. United States, 136 S. Ct. 1113 (2016) (1-1 split); *Luis v. United States*, 136 S. Ct. 1083 (2016) (1-1 split); *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016) (2-1 split); *Taylor v. United States*, 136 S. Ct. 2074 (2016) (2-1 split).

expressly considered and rejected the Eleventh Circuit's holding that § 2462 applies to claims for disgorgement. Pet. App. 13a. And it is undisputed that, if § 2462 applied, the $34.9 million disgorgement judgment against Petitioner could not stand: In the SEC's request for a money penalty concededly governed by § 2462's five-year limitations period, the SEC admitted that at most $5 million reflected securities-law violations arising "during the limitations period, i.e., on or after October 27, 2004." Pet. App. 26a–27a; Dkt. 181 at 2 (SEC's concession that the remaining $29.9 million reflected violations "[b]efore the limitations period"). Thus, the Tenth Circuit's holding regarding § 2462 was plainly outcome-determinative.

Moreover, this case is a strong vehicle because it is characteristic of the aggressive disgorgement claims that the SEC regularly pursues. For instance, courts have held that the SEC is not required to "trace[]" "specific assets ... back to a violation." *SEC v. Quan*, 817 F.3d 583, 594 (8th Cir. 2016); *see SEC v. Rosenthal*, 426 F. App'x 1, 3 (2d Cir. 2011). That principle applies in this case: the SEC cannot "trace" these funds to any funds still in Petitioner's possession, because those funds have been spent. Pet. App. 12a–13a; Dkt. 180 at 3, ¶ 11. Likewise, courts have held that a defendant may be liable to disgorge assets he never personally received. *See, e.g.*, *Contorinis*, 743 F.3d at 300, 307 (affirming disgorgement of $7.2 million despite "personal profit" of only $427,875). Again, this case illustrates that principle: the amount that Petitioner has been ordered to disgorge far exceeds any amount

that Petitioner ever received, and instead reflects payments to separate corporations, unrelated officers of those corporations, and even landlords. Pet. App. 3a–4a, 11a–12a, 22a–23a, 42a–43a; Dkt. 180 at 2, ¶ 7; Dkt. 181 at 2. The straightforward facts of this case well illustrate the potency of the disgorgement remedy and provide a strong vehicle for this Court's review.

III. THE TENTH CIRCUIT'S OPINION IS WRONG.

The Tenth Circuit erred in holding that § 2462 does not apply to disgorgement claims.

Disgorgement qualifies as "forfeiture" under § 2462. As the Eleventh Circuit persuasively explained in *Graham*, "forfeiture and disgorgement are effectively synonyms." 823 F.3d at 1363. The court pointed out that "Black's Law Dictionary defines disgorgement as '[t]he act of giving up something (such as profits illegally obtained) on demand or by legal compulsion,'" and provides "a very similar definition for forfeiture," which Black's defines as "'[t]he loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty.'" *Id.* (quoting Disgorgement, Forfeiture, *Black's Law Dictionary* (10th ed. 2014)). And even this Court has equated the two terms: In *United States v. Ursery*, 518 U.S. 267 (1996), this Court explained that forfeitures "are designed primarily to confiscate property used in violation of the law, and to require disgorgement of the fruits of illegal conduct." *Id.* at 284.

In rejecting *Graham*'s reasoning, the Tenth Circuit concluded that the term "forfeiture" referred only to *in*

rem forfeiture actions, and excluded remedies imposed as part of *in personam* government enforcement actions. Pet. App. 14a–15a. But nothing in the statutory text supports this artificial narrowing construction, especially given that the other two statutory terms in § 2462—"fine" and "penalty"—are remedies that are typically imposed in the context of *in personam* government enforcement actions.

Further, as the Tenth Circuit recognized, there are multiple federal statutes requiring illicit assets to be turned over to the government—and in those statutes, the turnover orders are referred to as orders of "forfeiture." Pet. App. 15–16a. The Tenth Circuit held that those statutes were irrelevant because they were enacted many years after the enactment of § 2462, Pet. App. 16a, but that reasoning is not persuasive. Congress referred to the turnover of illicit assets as "forfeiture" because it recognized that such turnovers were a species of "forfeiture" under the well-settled meaning of that term. For the same reason, the disgorgement order imposed by the District Court falls comfortably within the statutory definition of forfeiture.

The Tenth Circuit also held that § 2462 does not apply to disgorgement because it applies only to "punitive" remedies. According to the Tenth Circuit, disgorgement is not a "penalty" under § 2462 because "penalties" are punitive remedies, whereas disgorgement is not. Pet. App. 10a–13a. The Tenth Circuit then inferred that the term "forfeiture," too, applies only to punitive remedies, and that "[t]he nonpunitive remedy of disgorgement" therefore does

not qualify as a forfeiture. Pet. App. 14a–15a.

Even assuming § 2462 applies only to punitive remedies, disgorgement is a punitive remedy. As such, it amply qualifies as a "penalty," as well as a "forfeiture" even under the Tenth Circuit's restrictive definition of that term.

Disgorgement judgments are monetary judgments, payable to the government, imposed as a result of a judicial finding of wrongdoing. Disgorgement is not a compensatory remedy. The SEC is not "required to make any particular effort to compensate ... victims," *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 373 (2d Cir. 2011); *see Official Comm. of Unsecured Creditors of WorldCom, Inc. v. SEC*, 467 F.3d 73, 81 (2d Cir. 2006) (compensation is at best a "secondary goal"). Rather, the "primary purpose of disgorgement orders is to deter violations of the securities laws"—a classic characteristic of a punitive remedy. *SEC v. Fischbach Corp.*, 133 F.3d 170, 175 (2d Cir. 1997).

The Tenth Circuit characterized disgorgement as a nonpunitive remedy that "leaves the wrongdoer in the position he would have occupied had there been no misconduct." Pet. App. 11a (quotation marks omitted). But disgorgement is not merely a matter of the defendant returning a tainted asset that does not belong to him. As noted above, the SEC can obtain disgorgement of assets that are not traceable to a violation. *Supra* at 15; *see Quan*, 817 F.3d at 594. Thus, disgorgement constitutes the punitive "imposition of personal liability." *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 221 (2002). It is a money judgment, payable to the government,

that is premised on a judicial finding that *the law was violated*: a quintessentially punitive remedy. Moreover, the SEC can obtain disgorgement of assets that the defendant never personally received. *Supra* at 15; *see Contorinis*, 743 F.3d at 300, 307. Thus, disgorgement may leave a defendant worse off than the position he would have occupied without any misconduct—further underscoring that it is a punitive remedy.

Finally, the government's position is inconsistent with the longstanding American legal tradition of applying statutes of limitations to government enforcement actions seeking money judgments. In *Gabelli*, this Court, quoting Chief Justice Marshall, observed that it "'would be utterly repugnant to the genius of our laws' if actions for penalties could 'be brought at any distance of time.'" 133 S. Ct. at 1223 (quoting *Adams*, 6 U.S. (2 Cranch) 336, 342 (1805)). Thus, the Court rejected an interpretation of § 2462 that would leave defendants "exposed to Government enforcement action" for an indefinite "period into the future," and that eliminates the "security and stability to human affairs" that statutes of limitation aim to provide. *Id.* at 1221, 1223 (internal quotation marks omitted). Yet, under the government's interpretation of § 2462, that is precisely what will occur: enforcement actions seeking disgorgement may reach back forever. The Court should not contort the definition of "forfeiture" to reach this extraordinary outcome.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

CLINTON W. MARRS
MARRS GRIEBEL LAW, LTD.
1000 Gold Ave, SW
Albuquerque, NM 87102
(505) 433-3926
clinton@marrslegal.com

ADAM G. UNIKOWSKY
Counsel of Record
ZACHARY C. SCHAUF
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SECURITIES AND EXCHANGE COMMISSION

Plaintiff-Appellee,

v.

CHARLES R. KOKESH,

Defendant-Appellant.

No. 15-2087

FILED August 23, 2016
Elisabeth A. Shumaker
Clerk of Court

Appeal from the United States District Court for the District of New Mexico (D.C. No. 1:09-CV-01021-SMV-LAM)

Before HARTZ, PHILLIPS, and McHUGH, Circuit Judges.

The Securities and Exchange Commission (SEC) brought an enforcement action against Defendant Charles Kokesh for misappropriating funds from four

SEC-registered business development companies (BDCs) in violation of federal securities laws. After a jury returned a verdict in favor of the SEC, the United States District Court for the District of New Mexico entered a final judgment permanently enjoining Defendant from violating certain provisions of federal securities laws, ordering disgorgement of $34.9 million plus prejudgment interest of $18.1 million, and imposing a civil penalty of $2.4 million. Defendant appeals, asserting that the court's imposition of the disgorgement and permanent injunction was barred by 28 U.S.C. § 2462, which sets a five-year limitations period for suits "for the enforcement of any civil fine, penalty, or forfeiture." He also argues that the district court erred by precluding him from presenting evidence of attorney and accountant participation to show his lack of knowledge of the misconduct. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm. We hold that both the permanent injunction and the disgorgement order are remedial and not subject to § 2462. And we reject the evidentiary claim.

I. BACKGROUND

The BDCs from which Defendant misappropriated funds were Technology Funding Medical Partners I, L.P.; Technology Funding Partners III, L.P.; Technology Funding Venture Partners IV, An Aggressive Growth Fund, L.P.; and Technology Funding Venture Partners V, An Aggressive Growth Fund, L.P. (collectively, the Funds). The Funds raised money from investors through public securities offerings and invested in private start-up companies

that focused on technology, biotechnology, and medical diagnostics.

As a limited partnership, each Fund was governed by a written agreement. Each agreement provided for the election of three individual general partners and two managing general partners. The managing general partners conducted day-to-day operations and made investment recommendations, subject to supervision by the governance committee of each Fund, which was composed of the individual general partners or the individual general partners and two representatives of the managing general partners.

Technology Funding Ltd. and Technology Funding, Inc. (collectively, the Advisers), which were SEC-registered investment advisers, were the managing general partners for each Fund. The Advisers were owned and controlled by Defendant. They had contracts with the Funds—which were signed by Defendant—that described how they would be compensated. The contracts prohibited any payments to the Advisers that were not expressly specified.

From 1995 through 2006, Defendant directed the Advisers' treasurer to take $23.8 million from the Funds to pay salaries and bonuses to officers of the Advisers (which included Defendant himself) and to take $5 million to cover the Advisers' office rent. In 2000 he also caused the Advisers to take $6.1 million in payments described as "tax distributions" in SEC reports that he signed. Defendant received over 90% of these "tax distributions," despite paying only $10,304 in federal taxes that year.

These payments violated the contracts between the Advisers and the Funds. First, until 2000 the contracts prohibited payments for salaries of the Advisers' controlling persons, including Defendant and other officers. Although the contracts were amended in 2000 to permit reimbursement for controlling-person salaries, the amendment was based on a misleading proxy statement (signed by Defendant) which falsely identified him as the only controlling person and grossly underreported his annual salary. Second, the contracts did not provide for bonus payments and Defendant did not disclose the bonuses to the Funds' directors or in SEC filings that he signed on the Funds' behalf. Third, the contracts specifically prohibited rent reimbursement, yet he failed to disclose the rent payments to the Funds' directors. Fourth, although the contracts allowed for payment of tax obligations if certain conditions were met, the 2000 payment did not satisfy these conditions.

Before trial the SEC filed a motion in limine to preclude Defendant from offering evidence that he reasonably relied on the advice of his counsel and his accountants. The district court granted this motion under Fed. R. Evid. 403, finding that any probative value of such evidence was outweighed by the danger of confusing the issues and misleading the jury. The court acknowledged, however, that such evidence could be presented if Defendant met the test for an advice-of-counsel defense under *United States v. Wenger*, 427 F.3d 840 (10th Cir. 2005).

The case was tried to a jury, which found (1) that Defendant knowingly and willfully converted the

Funds' assets to his own use or to the use of another and (2) that he knowingly and substantially assisted the Advisers in defrauding the Funds, in filing false and misleading reports with the SEC, and in soliciting proxies using false and misleading proxy statements. The court found that disgorgement of $34.9 million "reasonably approximates the ill-gotten gains causally connected to Defendant's violations," Aplt. App., Vol. 2 at 1880 (order granting SEC's motion for entry of final judgment), and that an order enjoining him from violating certain provisions of federal securities laws was warranted because "there is a reasonable and substantial likelihood that Defendant will again violate the securities laws," *id.* at 1876.

II. DISCUSSION

Defendant appeals on two grounds: (1) that the injunction and disgorgement order, obtained under 15 U.S.C. § 78u(d)(1), (5), must be set aside because the claims accrued more than five years before the SEC brought its action and are therefore barred under the five-year statute of limitations in 28 U.S.C. § 2462 for government suits seeking penalties or forfeitures; and (2) that the district court erred in disallowing evidence of attorney and accountant participation to show his lack of knowledge of the misconduct. We address each in turn.

A. Section 2462

Unless another statute specifies otherwise, § 2462 sets a five-year limitations period for claims seeking certain sanctions. It states:

> Except as otherwise provided by Act of Congress, an *action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture*, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

Id. (emphasis added). "The construction and applicability of a federal statute of limitation is a question of law we review *de novo*." *United States v. Telluride Co.*, 146 F.3d 1241, 1244 (10th Cir. 1998). Statutes of limitation are interpreted narrowly in the government's favor "to protect the public from the negligence of public officers in failing to timely file claims in favor of the public's interests." *Id.* at 1246 n.7; *see also Guar. Trust Co. of New York v. United States*, 304 U.S. 126, 132–33, 58 S.Ct. 785, 82 L.Ed. 1224 (1938) (public policy generally supports not imposing laches or statutes of limitations on the government). And we have also recognized that equitable claims are usually not subject to statutes of limitations. *See Telluride*, 146 F.3d at 1245.

Defendant argues that the injunction (an order to refrain from future violations of certain provisions of federal securities laws) is a penalty and the disgorgement order is a penalty or forfeiture within the meaning of § 2462. We first discuss the injunction.

1. Injunction

The district court's final judgment ordered "that Defendant is permanently enjoined from directly or indirectly violating Section 206(1) and (2) of the Investment Advisers Act; Section 13(a) of the Exchange Act and Exchange Act Rules 12b-20, 13a-1, and 13a-13; Section 14(a) of the Exchange Act and Exchange Act Rule 14a-9; Section 37 of the Investment Company Act, and Section 205(a) of the Investment Advisers Act." Aplt. App., Vol. 2 at 1883 (final judgment). We fail to see how an order to obey the law is a penalty. Its purpose is not to penalize Defendant; after all, everyone has a duty to obey the law. It is to protect the public by giving Defendant an added incentive to conduct himself in accordance with the securities laws: violating the injunction would subject him to the court's contempt power, *see* 18 U.S.C. § 401(3) (authorizing courts to punish disobedience of a lawful order). It has been recognized for some time that such an order is "purely remedial and preventative," and not a penalty or forfeiture. *Drath v. F.T.C.*, 239 F.2d 452, 454 (D.C. Cir. 1956) (internal quotation marks omitted); *see id.* ("One is not prosecuted by being told to desist from illegal conduct, nor does he thereby suffer the imposition of a penalty or the forfeiture of any legally-protected right or property."); *Welch Sci. Co. v. N.L.R.B.*, 340 F.2d 199, 202–03 (2d Cir. 1965) (NLRB's order that "the company should cease and desist from interrogating the New York employees concerning their [union] membership" (a violation of the National Labor Relations Act) was "purely remedial"); *cf. Hecht Co. v. Bowles*, 321 U.S. 321, 329, 64

S.Ct. 587, 88 L.Ed. 754 (1944) ("The historic injunctive process was designed to deter, not to punish."). More recently, the D.C. Circuit applied that proposition to hold that § 2462 does not apply to an SEC cease-and-desist order to refrain from violating securities laws. *See Riordan v. S.E.C.*, 627 F.3d 1230, 1234–35 (D.C. Cir. 2010); *In the Matter of Guy P. Riordan*, Release No. 9085, 2009 WL 4731397 (Dec. 11, 2009) (ordering "that Guy P. Riordan cease and desist from committing or causing any violations or future violations of Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934, and Exchange Act Rule 10b-5"). We fully agree with the D.C. Circuit.

Defendant relies on another decision by that circuit, *Johnson v. S.E.C.*, 87 F.3d 484, 491–92 (D.C. Cir. 1996), holding that the SEC injunction in that case did impose a penalty. But in *Johnson* the injunction censured the violator and imposed a six-month disciplinary suspension "from acting in a supervisory capacity with any broker or dealer." *Id.* at 486. The court held that on the facts of record "it is evident that the sanctions here were not based on any ... showing of the risk she posed to the public, but rather were based on [her] alleged failure reasonably to supervise [a subordinate]." *Id.* at 489. The court rejected the SEC's contention that "the sanctions were imposed not as punishment for past dereliction, but primarily because of [her] present danger to the public." *Id.* at 490. We need not assess whether we agree with that opinion. We need only point out that there is a qualitative difference between a disciplinary suspension and being ordered to comply

with the law. There is no inconsistency between the circuit's decision in *Johnson* and its later decision in *Riordan* holding that § 2462 does not apply to an order requiring compliance with the securities laws.

Finally, Defendant argues that in light of his age, insolvency (and meager prospects of recovering from it), and the passage of time since his unlawful conduct, he is unlikely to engage in the conduct for which he is liable here, so the injunction must be intended solely to punish him. He further argues that the SEC did not allege any wrongdoing by him after the Funds and the Advisers were dissolved, so he is being punished for past conduct, as in *Johnson*. We are not persuaded. If Defendant is not going to engage in securities-related activity, the order does not punish him. And the absence of SEC allegations of recent misconduct did not preclude the district court from finding that he still poses a risk to the public. The court found that Defendant's occupation would "present opportunities for future violations" because of his extensive experience with owning and controlling investment-adviser firms and operating investment companies. Also, noting Defendant's work history, his extravagant lifestyle, and his demeanor, the court expressly rejected his statement that he would not engage in business activity that could present opportunities for future securities-laws violations. These are factual matters and the court did not clearly err in its findings. *See Att'y. Gen. of Oklahoma v. Tyson Foods, Inc.*, 565 F.3d 769, 775–76 (10th Cir. 2009) (factual findings underlying injunction are reviewed for clear error).

2. Disgorgement

Disgorgement "consists of factfinding by a district court to determine the amount of money acquired through wrongdoing—a process sometimes called 'accounting'—and an order compelling the wrongdoer to pay that amount plus interest to the court." *United States v. Badger*, 818 F.3d 563, 566 (10th Cir. 2016) (internal quotation marks omitted). The amount of the disgorgement is essentially the same whether the relief is sought in a private cause of action or, as in this case, by the government. *See* 15 U.S.C. § 78u(d)(5) (authorizing court to grant equitable relief sought by SEC); *F.T.C. v. Bronson Partners, LLC*, 654 F.3d 359, 369–70 (2d Cir. 2011) (affirming district court's award because it "satisfies the requirements of equitable disgorgement").

Defendant, who owned and controlled the Advisers, misappropriated $34.9 million from the Funds between 1995 and 2006 to pay salaries and bonuses to officers of the Advisers (including himself), to pay the Advisers' office rent, and to pay phony "tax distributions." The district court ordered him to disgorge this money that went to him and his subordinate cohorts, finding that the sum "reasonably approximates the ill-gotten gains causally connected to [his] violations." Aplt. App., Vol. 2 at 1880. Defendant claims that the disgorgement order is a penalty or forfeiture. We disagree. We first address the claim that it is a penalty.

We have previously said that disgorgement is not a penalty under § 2462 because it is remedial. *See Telluride*, 146 F.3d at 1247 ("[O]ther equitable remedies, *such as disgorgement*, which sanction past

conduct, are remedial [rather than punitive]." (emphasis added)). Other circuits have similarly held that it is not. *See Riordan*, 627 F.3d at 1234 ("[D]isgorgement orders are not penalties, at least so long as the disgorged amount is causally related to the wrongdoing."); *S.E.C. v. Tambone*, 550 F.3d 106, 148 (1st Cir. 2008) ("[T]he applicable five-year statute of limitations period [the defendant] invokes applies only to penalties sought by the SEC, not its request for injunctive relief or the disgorgement of ill-gotten gains."), *withdrawn*, 573 F.3d 54 (1st Cir. 2009), *reinstated in relevant part*, 597 F.3d 436, 450 (1st Cir. 2010).

The reasons for this view are clear. Properly applied, the disgorgement remedy does not inflict punishment. "The object of restitution [in the disgorgement context] ... is to eliminate profit from wrongdoing while avoiding, so far as possible, the imposition of a penalty." Restatement (Third) of Restitution and Unjust Enrichment § 51(4) (Am. Law Inst. 2010). Disgorgement just leaves the wrongdoer "in the position he would have occupied had there been no misconduct." *Id.* § 51 cmt. k; *see id.* ("Disgorgement of wrongful gain is not a punitive remedy."). To be sure, disgorgement serves a deterrent purpose, but it does so only by depriving the wrongdoer of the benefits of wrongdoing. *See S.E.C. v. Contorinis*, 743 F.3d 296, 301 (2d Cir. 2014) ("[D]isgorgement does not serve a punitive function.... [Its] underlying purpose is to make lawbreaking unprofitable for the law-breaker...."); *S.E.C. v. First City Fin. Corp.*, 890 F.2d 1215, 1231 (D.C. Cir. 1989) ("[D]isgorgement primarily serves to

prevent unjust enrichment...."). Indeed, if punishment is required, disgorgement can be supplemented with exemplary damages. *See* Restatement (Third) § 51 cmt. k.

Defendant complains that the disgorgement order is punitive because he is being required to disgorge more than he actually gained himself (some of the misappropriated money went to others). But there is nothing punitive about requiring a wrongdoer to pay for all the funds he caused to be improperly diverted to others as well as to himself. *See Contorinis*, 743 F.3d at 307 ("[W]hen third parties have benefitted from illegal activity, it is possible to seek disgorgement from the violator, even if that violator never controlled the funds. The logic of this ... is that to fail to impose disgorgement on such violators would allow them to unjustly enrich their affiliates."); *S.E.C. v. Platforms Wireless Int'l Corp.*, 617 F.3d 1072, 1098 (9th Cir. 2010) ("A person who controls the distribution of illegally obtained funds is liable for the funds he or she dissipated as well as the funds he or she retained."); *S.E.C. v. JT Wallenbrock & Assocs.*, 440 F.3d 1109, 1114–15 (9th Cir. 2006) (defendant was not entitled to deduct business and operating expenses from the amount of his disgorgement because "it would be unjust to permit the defendants to offset against the investor dollars they received the expenses of running the very business they created to defraud those investors into giving the defendants the money in the first place"); *S.E.C. v. Banner Fund Int'l*, 211 F.3d 602, 617 (D.C. Cir. 2000) ("[A]n order to disgorge establishes a personal liability, which the defendant must satisfy

regardless whether he retains the selfsame proceeds of his wrongdoing."). After all, we do not consider it punitive to require a personal-injury tortfeasor to pay for all damages caused by his tort (say, a motor-vehicle accident) even if he gained nothing thereby.

Defendant also argues that the disgorgement order is punitive because in light of his age (late sixties) and insolvency, there is no prospect of his restoring the gains he received. But the likelihood of the government's recovery is irrelevant to determining whether his disgorgement order is punitive or remedial because it does not change the nature of the sanction. The disgorgement order does not require Defendant to do more than he is capable of.

Defendant next contends that disgorgement is a "forfeiture." To be sure, in common English the words *forfeit* and *disgorge* (as well as *relinquish*) capture similar concepts; one subject to formal forfeiture could be said to "disgorge" what is forfeited. The definitions in the leading legal dictionary, although different, also have similarities. *See Black's Law Dictionary* 568, 765 (10th ed. 2014) (defining *disgorgement* as "[t]he act of giving up something (such as profits illegally obtained) on demand or by legal compulsion," and *forfeiture* as "[t]he loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty"). Because of these similarities the Eleventh Circuit recently held that disgorgement is a forfeiture under § 2462. *See S.E.C. v. Graham*, 823 F.3d 1357, 1363–64 (11th Cir. 2016).

Other circuits have a different view. *See Riordan*, 627 F.3d at 1234; *Tambone*, 550 F.3d at 148 (§ 2462 does

not apply to disgorgement); *see also S.E.C. v. Saltsman*, No. 07–CV–4370 (NGG) (RML), 2016 WL 4136829, at *25–29 (E.D.N.Y. Aug. 2, 2016) (rejecting *Graham* and citing three other district courts sharing that view). Respectfully, we also see things a bit differently. The word *forfeiture* in § 2462 must be read in the context of government causes of action—"an action, suit or proceeding," 28 U.S.C. § 2462. Government forfeiture actions date back to the early days of the Republic, and for most of the time since then have had a narrow focus. Forfeiture was an in rem procedure to take "tangible property used in criminal activity." *United States v. 92 Buena Vista Ave.*, 507 U.S. 111, 118, 113 S.Ct. 1126, 122 L.Ed.2d 469 (1993). Indeed, *Black's Law Dictionary* defines *civil forfeiture*—which, in our view, is the relevant definition here—as "[a]n in rem proceeding brought by the government against property that either facilitated a crime or was acquired as a result of criminal activity." As the Supreme Court has summarized: "The First Congress enacted legislation authorizing the seizure and forfeiture of ships and cargos involved in customs offenses. Other statutes authorized the seizure of ships engaged in piracy.... Later statutes involved the seizure and forfeiture of distilleries and other property used to defraud the United States of tax revenues from the sale of alcoholic beverages." *Id.* at 119–20, 113 S.Ct. 1126. The owner of the seized property could be completely innocent of any wrongdoing, and the value of the property taken have no necessary relation to any loss to others or gain to the owner. A modern-day example makes the point. In *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed.2d 452

(1974), the Supreme Court affirmed a forfeiture proceeding in which a yacht was seized from an innocent owner after government officers apparently found only one marijuana cigarette on the yacht while it was under the control of the lessee, *see id.* at 693, 94 S.Ct. 2080 (Douglas, J., dissenting).

When the term *forfeiture* is linked in § 2462 to the undoubtedly punitive actions for a *civil fine* or *penalty*, it seems apparent that Congress was contemplating the meaning of *forfeiture* in this historical sense. The nonpunitive remedy of disgorgement does not fit in that company. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* ch. 31, 195–98 (2012) ("Associated words bear on one another's meaning (*noscitur a sociis*)."). In fact, construing a predecessor to § 2462, which imposed a five-year limitations period for a "suit or prosecution for any penalty or forfeiture," the Supreme Court said that "[t]he words 'penalty or forfeiture' in this section refer to something imposed in a punitive way for an infraction of a public law." *Meeker v. Lehigh Valley R.R. Co.*, 236 U.S. 412, 423, 35 S.Ct. 328, 59 L.Ed. 644 (1915).

We recognize that in recent years some federal forfeiture statutes have been expanded to include disgorgement-type remedies, *see* 18 U.S.C. § 1963(a)(3) (authorizing forfeiture of *proceeds* from racketeering activity); 21 U.S.C. § 881(a)(6) (authorizing forfeiture of the *proceeds* of illegal drug transactions). But this is a recent development, occurring decades after § 2462 was enacted in 1948. The Supreme Court recently discussed the development in *United States v. 92 Buena Vista*

Ave., 507 U.S. 111, 113 S.Ct. 1126, 122 L.Ed.2d 469 (1993) (addressing scope of innocent-owner exception to federal forfeiture statute). The introduction of "disgorgement" features in the forfeiture laws began with the 1978 amendment to the Comprehensive Drug Abuse Prevention and Control Act of 1970, which "authorize[d] the seizure and forfeiture of proceeds of illegal drug transactions" and continued with the 1984 amendment to the Racketeer Influenced and Corrupt Organizations Act, which likewise authorized "forfeiture of 'proceeds'" from racketeering activity. *Id.* at 121 & n.16, 113 S.Ct. 1126. These changes in the forfeiture statutes "marked an important *expansion* of governmental power." *Id.* at 121, 113 S.Ct. 1126 (emphasis added). But this expansion should not expand the meaning of the word *forfeiture* in § 2462 to encompass traditional disgorgement remedies outside those forfeiture statutes. We have said that when interpreting statutory language, "words will be interpreted as taking their ordinary, contemporary, common meaning at the time Congress enacted the statute." *Hackwell v. United States*, 491 F.3d 1229, 1236 (10th Cir. 2007) (internal quotation marks omitted).

Further, we must not forget that we are to construe § 2462 in the government's favor to avoid a limitations bar. *See Telluride*, 146 F.3d at 1246 & n.7. We should not strain to expand the meaning of the statute's language to restrict the government. We conclude that the disgorgement order in this case is not a forfeiture within the meaning of § 2462.

Because we hold that the disgorgement order and injunction in this case are neither penalties nor

forfeitures under § 2462, we need not decide whether (as requested by the government) the statute is inapplicable to all equitable remedies; nor need we decide whether disgorgement remedies in forfeiture statutes come under § 2462. And for the same reason, we need not address Defendant's arguments that the government's causes of action accrued more than five years before it filed suit and that the statute is jurisdictional.

B. Evidence of the Participation of Lawyers and Accountants

Defendant argues that the district court erred in disallowing his proffered evidence of attorney and accountant participation. He asserts that the evidence was proper to "show[ ] that, because of his dealings with the Funds' lawyers and accountants, he had no contemporaneous awareness that he was 'part of an overall activity that was improper' and did not knowingly assist primary violation, of which he was unaware." Aplt. Br. at 61.

Evidence of reliance on professionals such as attorneys and accountants is, however, significantly restricted in this circuit. Under the standard set forth in *Wenger*, ordinarily "the defendant must show (1) a request for advice of [independent] counsel on the legality of a proposed action, (2) full disclosure of the relevant facts to counsel, (3) receipt of advice from counsel that the action to be taken will be legal, and (4) reliance in good faith on counsel's advice," 427 F.3d at 853 (internal quotation marks omitted); *see C.E. Carlson, Inc. v. S.E.C.*, 859 F.2d 1429, 1436 (10th Cir. 1988). Defendant does not contend that he satisfied the

Wenger requirements in seeking to put on evidence regarding his attorneys and accountants. Rather, he argues that *Wenger* is inapplicable. As we understand his position, it is that restrictions on evidence of reliance on professionals concerns only evidence offered to negate specific intent such as willfulness or intent to defraud. Here, in contrast, he claims to be offering the evidence to negate his knowledge of relevant facts. That may be a valid distinction. If a defendant contends that a professional adviser failed to convey historical facts, *Wenger* may not apply. But if Defendant is merely saying that a professional adviser failed to convey the "fact" that a transaction contravened a contract or a statute (that is, failed to convey professional advice), *Wenger* controls. Unfortunately for Defendant, his briefs on appeal do not preserve the issue. Although he cites to the record, we decline to review his challenge to the exclusion of evidence because his briefs fail to identify specific items of testimony that would have been offered and to state why each would have been relevant. *See Reinhart v. Lincoln County*, 482 F.3d 1225, 1228 n.1 (10th Cir. 2007) (citation to record did not preserve issue). Moreover, even if Defendant's evidence was somewhat probative, it could be excluded under Fed. R. Evid. 403 if "its probative value is substantially outweighed by a danger of ... confusing the issues." And, as Defendant acknowledges in his opening brief, the district court relied on that rule to exclude evidence about his attorneys and accountants. Yet Defendant's opening brief never addresses this basis for excluding his evidence. This failure waives the issue on appeal. *See SCO Grp., Inc. v. Novell, Inc.*, 578 F.3d 1201, 1226 (10th

Cir. 2009) (issue is waived when appellant fails to challenge an "alternative, independently sufficient basis for the district court's ruling" in its opening brief); *Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th Cir. 2007) ("[W]e routinely have declined to consider arguments that are not raised, or are inadequately presented, in an appellant's opening brief."). We therefore affirm exclusion of the evidence.

III. CONCLUSION

We AFFIRM the district court's final judgment.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

No. 09-cv-1021 SMV/LAM

CHARLES R. KOKESH,

Defendant.

March 30, 2015

MEMORANDUM OPINION AND ORDER GRANTING PLAINTIFF'S MOTION FOR ENTRY OF FINAL JUDGMENT

THIS MATTER is before the Court on Plaintiff's Motion for Entry of Final Judgment against Defendant Charles R. Kokesh [Doc. 176] ("Motion"), filed on December 2, 2014. Defendant filed his Response and Declaration on January 7, 2015. [Docs. 179, 180]. Plaintiff replied on January 21, 2015. [Doc. 181]. The Court heard oral argument on March 9, 2015. Having considered the motion, briefing, oral argument, record, and relevant law and being otherwise fully advised in the premises, the Court finds that the Motion is well-taken and will be GRANTED.

I. BACKGROUND

Defendant owned and controlled two SEC-registered investment-adviser firms, Technology Funding Ltd. ("TFL") and Technology Funding, Inc. ("TFI") (collectively, "the Advisers"). TFL and TFI were contracted to provide investment advice to four SEC-registered business development companies ("BDCs" or "Funds"). Plaintiff filed its Complaint [Doc. 1] on October 27, 2009, alleging that, *inter alia*, from 1995 through July 2007, Defendant misappropriated more than $34.9 million from the Funds; caused the filing of false and misleading SEC reports and proxy statements to conceal the truth about his misappropriation scheme; and caused the execution, renewal, and performance of contracts with illegal performance-fee provisions. [Doc. 166] at 11–16. The Court presided over a five-day jury trial that began on November 3, 2014, [Doc. 168], and concluded with a jury verdict against Defendant on all claims, [Doc. 174].

A. Direct Violations

The jury rendered a verdict against Defendant, finding that he "knowingly and willfully" converted investment-company assets to his own use or to the use of another, in direct violation of § 37 of the Investment Company Act of 1940 ("Investment Company Act"), 15 U.S.C. § 80a-36. [Doc. 174] at 2; [Doc. 166] at 30. Specifically, the evidence established that, through two investment advisers he owned and controlled, TFL and TFI, Defendant converted $34,927,329 from the Funds as follows:

First, from 1995 through 2006, Defendant directed the Advisers' treasurer, Charlie Freeman, to take $23,807,091 from the Funds to pay salaries and bonuses to Defendant and other officers of the Advisers. The contracts between the Advisers and the Funds contained no bonus provision and prohibited payments to the Advisers that were not expressly specified in the contracts. Defendant signed the contracts. Defendant did not disclose the bonus payments to the Funds' directors or in SEC filings he signed on the Funds' behalf.

Moreover, until a 2000 amendment, the contracts specifically prohibited reimbursements to cover salaries of the Advisers' "controlling persons," including Defendant and the other officers. The 2000 amendment permitted reimbursement for controlling-person salaries. But it was based on misleading proxy statements signed by Defendant that falsely identified him as the only controlling person. The proxy statements also falsely stated that Defendant's average annual salary from 1998 through 2000 was $221,000 when, in fact, it was $771,000. Following the amendment, Defendant caused TFL and TFI to take average annual payments more than 15 times greater than the anticipated average annual payments disclosed in the proxy statements.

Second, from 1995 through 2006, Defendant directed Freeman to take $5,007,441 from the Funds to cover the Advisers' office rent. Defendant knew the contracts specifically prohibited such rent reimbursement. Defendant did not disclose the rent payments to the Funds' directors.

Third, in 2000, Defendant caused the Advisers to take $6,112,797 in payments falsely described in SEC reports he signed as "tax distributions." The contracts required several conditions to be met before the Advisers could be paid a distribution to cover their tax obligations. But the payments in 2000 did not satisfy the contracts' stated conditions for tax distributions and had nothing to do with any tax obligation. Defendant personally received more than 90% of the money. Defendant knew the money he received was not related to a tax liability, but he did not return the money to the Funds. Defendant paid only $10,304 in federal taxes in 2000.

B. Aiding-and-Abetting Violations

From the same misconduct described above, the jury found that Defendant "knowingly and substantially assisted" the Advisers to employ a device, scheme, or artifice to defraud a client and to engage in a transaction, practice, or course of business that operated or would operate as a fraud or deceit upon a client and that, in so doing, Defendant aided and abetted violations of Sections 206(1) and 206(2) of the Advisers Act, 15 U.S.C. §§ 80b-6(1) and (2). [Doc. 174] at 1; [Doc. 166] at 18, 21. The jury further found that he aided and abetted violations of § 205 of the Advisers Act, 15 U.S.C. § 80b-5, by knowingly assisting an investment adviser to perform on a contract that provided for illegal profit sharing in an investment company.

The jury also found that Defendant knowingly and substantially assisted the Funds in filing false and misleading quarterly and annual reports with the SEC

and in soliciting proxies using false and misleading proxy statements, thereby aiding and abetting violations of § 13(a) and 14(a) of the Exchange Act, 15 U.S.C. §§ 78m and 78n, and Exchange Act Rules 12b-20, 13a-1, 13a-13, and 14a-9, 17 C.F.R. §§ 240.12b-20, 13a-1, 13a-13, and 14a-9.

Under § 209(f) of the Investment Advisers Act of 1940 ("Advisers Act") and § 20(e) of the Securities Exchange Act of 1934 ("Exchange Act"), any person who aids and abets another person's violation shall be deemed to be in violation to the same extent as the person who committed the violation. 15 U.S.C. §§ 80b-9(f) and 78t(e). Accordingly, having been found liable of aiding and abetting certain violations of the securities laws, Defendant is deemed to be in violation to same extent as the primary violators.

C. Plaintiff's Motion for Entry of Judgment

Based on the jury's verdict, Plaintiff filed the instant Motion seeking entry of final judgment ordering Defendant: (1) to pay a civil money penalty, (2) to be permanently enjoined from violating specified provisions of federal securities laws, and (3) to disgorge the amounts that Defendant misappropriated in violation of securities laws. [Doc. 176] at 1. Defendant urges the Court to deny all of the requested relief.

II. ANALYSIS

The statute of limitations at 15 U.S.C. § 2462 applies to the civil money penalty and, thus, limits the total amount of penalty that the Court may impose. However, because some of the claims first accrued

within the limitations period, § 2462 does not bar a civil money penalty in its entirety. In light of the facts and circumstances, the Court finds that a third-tier, civil money penalty should be imposed against Defendant in the amount of $2,354,593.

The Court further finds that neither injunction nor disgorgement constitutes a "penalty" in this case because neither is unrelated to, or in excess of, the damages caused by Defendant. In fact, they are tailored to the injury caused by Defendant. Therefore, neither injunction nor disgorgement is subject to the statute of limitations at § 2462.

The Court further finds that there is a reasonable and substantial likelihood that Defendant, if not enjoined, will violate securities laws in the future. Accordingly, he will be permanently enjoined from violating the securities laws.

Finally, the Court determines that $34,927,329 reasonably approximates the ill-gotten gains causally connected to Defendant's violations and will order him to disgorge that amount, plus prejudgment interest of $18,077,103.37.

A. The Court will impose a civil penalty against Defendant in the amount of $2,354,593.

There is no dispute that a civil money penalty generally would be available for the violations at issue in this case. [Doc. 176] at 9 (citing 78u(d); 80b-9(e); and 80a-41(e)); [Doc. 179] at 5. Similarly, there is no dispute that § 2462 applies to such a penalty and, thus, limits

the time period during which Plaintiff may seek to enforce it. The statute reads:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

§ 2462. The parties further agree that because Plaintiff filed its Complaint on October 27, 2009, the relevant limitations period begins on October 27, 2004. Accordingly, there is no dispute that the claim for a civil money penalty must have "first accrued" on or later than October 27, 2004. If it "first accrued" on or prior to October 26, 2004, it would be barred.[1]

The parties dispute when the claim for the civil money penalty "first accrued." Plaintiff maintains that the claim accrued for purposes of § 2462 when the monies at issue were taken by Defendant. [Doc. 181] at 1–3. Plaintiff concedes that monies taken by Defendant on or before October 26, 2004, are barred by § 2462. *Id.* However, according to Plaintiff, Defendant took $5,004,773 and also signed and filed misleading reports with Plaintiff during the limitations period, i.e., on or

---

[1] The five-year limitations period may be subject to tolling under certain circumstances. *SEC v. Jones*, 476 F. Supp. 2d 374, 381 (S.D.N.Y. 2007). However, here, Plaintiff does not argue that it is entitled to tolling. *See* [Doc. 181].

after October 27, 2004.[2] *Id.* Therefore, Plaintiff urges the Court to impose a civil monetary penalty against him for $5,004,773. *Id.*

Defendant argues that no monetary penalty should be imposed because the claim first accrued prior to the limitations period. Defendant's position is that accrual occurred, not when he took funds, but rather when he submitted the first of certain filings with Plaintiff. Specifically, he argues that the claim related to his improper receipt of incentive payments accrued when "the registration statements originally containing the unauthorized incentive compensation plans were filed with the SEC." [Doc. 179] at 3 (citing Exs. 2, 54, 165, 274), at 7 (such statements were filed between 1986 and 1992). He argues further that the claim related to the wrongful tax distributions accrued when the quarterly 10Qs and annual 10Ks were filed with SEC in May of 2000. [Doc. 179] at 7; at 4 (citing Exs. 83, 195, 295, (10Qs) 91, 203, 299 (10Ks)). Finally, the claim related to the improper payments to "controlling persons" accrued when the related definitive proxy solicitations were filed with Plaintiff on Nov. 8, 2000. [Doc. 179] at 3 (citing Exs. 29, 90, 202, 298), at 7. Defendant makes no argument regarding the accrual of the claim related to the improper rent payments. *See* [Doc. 179].

---

[2] The monies included improper payments to "controlling persons," office-rent payments, and bonuses. [Doc. 181] at 1–3. The misleading reports are contained in Exhibits 117, 119, 122, 127, 131, 134, 139, 156, 232, 233, 239, 243, 245, 247, 252, 268, 323, 325, 330, 334, 338, 340, and 346. [Doc. 181] at 3, n.4.

A claim "accrues" under § 2462 when the fraud occurs (as opposed to when it is discovered). *Gabelli v. SEC*, 133 S. Ct. 1216, 1220 (2013). In this case, Defendant's fraud spanned 12 years and continued into the limitations period. Therefore, his fraud accrued both before and after October 27, 2004, the limitations cut-off for the purposes of § 2462. Under *Gabelli*, the fraud that accrued before the cut-off would be barred by § 2462, while the fraud accruing after would not. Accordingly, some of the illegally obtained funds—those distributed after on or after October 27, 2004—are not barred by the statute of limitations.

Having found that some of the illegally obtained funds would not be barred by § 2462, the Court must still evaluate whether to impose a civil money penalty, and if so, how much. The relevant statutes set forth a three-tier penalty structure in which each tier provides for a penalty that shall not exceed the greater of either a specific enumerated statutory amount or "the gross amount of pecuniary gain to such defendant as a result of the violation." 15 U.S.C. §§ 78u(d)(3)(B), 80b-9(e)(2), 80a-41(e)(2). A first-tier penalty cannot exceed the greater of $5,000 or the gross amount of pecuniary gain; a second-tier penalty cannot exceed the greater of $50,000 or the gross amount of pecuniary gain; and a third-tier penalty cannot exceed the greater of $100,000 or the gross amount of pecuniary gain. *Id.*[3] The

---

[3] Although the statute itself provides for enumerated penalties not to exceed $5,000, $50,000, and $100,000, respectively, this statutory amount has been adjusted for inflation pursuant to the Debt Collections Improvement Act of 1996, Pub. L. No. 104-134, § 31001 (April 26, 1996). *See* 17 C.F.R. § 201.1003. Accordingly, the

first-tier penalty appears to be the default penalty amount. A second-tier penalty is appropriate if the violation "involved fraud, deceit, manipulation, or deliberate or reckless disregard for a regulatory requirement." §§ 78u(d)(3)(B)(ii), 80b-9(e)(2)(B), 80a-41(e)(2)(B). A third-tier penalty is appropriate if the requirements for a second-tier penalty are met and the violation "directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons." §§ 78u(d)(3)(B)(iii), 80b-9(e)(2)(C), 80a-41(e)(2)(C).

Courts determine the amount of the civil penalty, if any, "in light of the facts and circumstances" of the particular case. §§ 78u(d)(3)(B), 80b-9(e)(2), 80a-41(e)(2). In determining the amount of a civil penalty, courts have looked to various factors, including: (1) the egregiousness of the violations at issue; (2) the degree of the defendant's scienter; (3) whether the violations were isolated or recurrent; (4) a defendant's failure to admit wrongdoing; (5) whether the defendant's conduct created substantial losses or the risk of substantial losses to investors; (6) defendant's lack of cooperation and honesty with authorities; and (7) whether an otherwise appropriate penalty should be reduced due to the defendant's demonstrated current and future financial condition. *SEC v. United Amer. Ventures, LLC*, 2012 U.S. Dist. LEXIS 51978, *24 (D.N.M. Mar. 2, 2012) (citing *S.E.C.*

---

actual statutory amounts have increased. However, the specific amounts are not ultimately consequential here because the Court does not rely on them in awarding the civil money penalty. *See infra.*

v. Universal Express, Inc., 646 F. Supp. 2d 552, 568 (S.D.N.Y. 2009) (listing factors)). The purpose of a civil penalty is to punish the wrongdoer and discourage future violations of the securities laws. *See, e.g., id.* at *27 (considering punishment and deterrence in imposing civil money penalties).

In this case, Defendant was found liable for numerous "knowing" violations of securities laws, and the circumstances were egregious. He misappropriated nearly $35 million over an 11-year period, abusing his roles in several adviser and investment firms for his own personal benefit and to the detriment of investors. He specifically targeted smaller investors (those investing $5,000 or less) because they would be less likely to sue if they discovered his schemes. *See* Trial Transcript dated Nov. 4, 2014 [Doc. 163] at 43–44. Based on these circumstances, the Court finds that Defendant's violations were egregious.

Defendant was aware of his wrongdoing, which supports a higher civil penalty. Scienter, according to the Supreme Court, is knowing or intentional misconduct designed to deceive or defraud investors. *Rolf v. Blyth, Eastman Dillon & Co., Inc.*, 570 F.2d 38, 45 (2nd Cir. 1978) (citing *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 (1976)); *see also SEC v. Wall Street Pub. Institute, Inc.*, 591 F. Supp. 1070, 1084 (D.D.C. 1984) (scienter established by showing intentional, knowing, or reckless conduct resulting in the alleged fraud or deceit). Tenth Circuit authority has reasoned that illegal conduct that is knowing and willful satisfies the scienter requirement. *Edward J. Mawod & Co. v. SEC*, 591 F.2d 588 (10th Cir. 1979). Defendant is highly

educated and by all accounts highly intelligent and knowledgeable about advising and investing. These circumstances, coupled with the vast extent of the fraud, tend to show that Defendant acted with a high degree of scienter.

The fourth and fifth factors support a higher civil penalty, but the sixth and seventh do not. Defendant has never admitted any wrongdoing. Even in the face of a unanimous jury verdict, Defendant has not recognized his wrongful conduct. In his Declaration, [Doc. 180], filed concurrently with the Response, [Doc. 179], Defendant blames the dissolution of the Funds on market conditions and certain market collapses. *Id.* Defendant also blames the "profound changes in the capital markets" since 2000 rather than take any responsibility for his own conduct. [Doc. 179] at 9. He even blames those in control of the very funds he pilfered. *See* Final Jury Instructions [Doc. 166] at 15–17. His conduct created substantial losses to investors. However, Defendant has cooperated with Plaintiff's investigations. Defendant strenuously emphasizes the seventh factor. He insists that he is insolvent and has no prospect of recovering from insolvency, which if true, may support a lower civil penalty.

Balancing these factors, and pursuant to 78u(d)(3)(B)(iii), 80b-9(e)(2)(C), and 80a-41(e)(2)(C), the Court finds that Defendant meets the statutory requirements for third-tier penalties. In furtherance of the dual purposes of punishment and deterrence, and on careful consideration of all the circumstances, the Court finds that a civil money penalty equal to the

amount of funds that Defendant himself received during the limitations period, or $2,354,593, is warranted.[4] *See* [Doc. 179] at 4 (Defendant's calculated total).

B. The Court will permanently enjoin Defendant from violating the securities laws and order him to disgorge $34,927,329 plus prejudgment interest of $18,077,103.37.

The parties agree that the violations at issue in this case could result in an injunction barring further violations, as well as a disgorgement order. [Doc. 176] at 4–5 (citing 15 U.S.C. §§ 78u(d), 80b-9(d), 80a-41(d)); *see* [Doc. 179] at 8–11. Additionally, the parties agree that an injunction or disgorgement order, being an equitable remedy, would not be subject to the five-year statute-of-limitations found in § 2462. [Doc. 179] at 8–11; [Doc. 181] at 3–7. They also agree that if an injunction or disgorgement order did amount to a "penalty," those remedies would then become subject to the § 2462 limitations period. [Doc. 179] at 8–11; [Doc. 181] at 3–7.

The dispute here is whether the injunction or disgorgement order requested by Plaintiff constitutes a "penalty" such that § 2462 would apply. Plaintiff argues

---

[4] This finding should not be interpreted as a legal determination on whether civil money penalties may be imposed for monies paid to third-parties. Although Defendant has raised such argument, [Doc. 179] at 4–6, the Court need not reach the issue because, here, a penalty exceeding the amount that Defendant himself received is not warranted anyway.

that neither remedy amounts to a "penalty," and therefore, § 2462 does not apply. Plaintiff urges the Court to permanently enjoin Defendant from violating the securities law and to order him to disgorge all of his ill-gotten gains, in the amount of $34,927,329. [Docs. 176, 181].

Defendant argues that neither an injunction nor a disgorgement order—apparently in any amount—is permissible. He makes the same § 2462 statute-of-limitations argument here that he makes against a civil penalty. *See* n.4, *supra*. With respect to these (traditionally) equitable remedies, however, he makes a necessary additional argument. He insists that an injunction or disgorgement order would constitute a civil penalty under § 2462. If he is correct, and if either constitutes a civil penalty, then § 2462's statute-of-limitations period applies. As he did with the civil-money-penalty argument, Defendant posits that all of Plaintiff's claims "first accrued" prior to October 27, 2004. Therefore, any injunction or disgorgement order would be barred by § 2462. To support his theory, he points to *SEC v. Graham*, 21 F. Supp. 3d 1300 (S.D. Fla. 2014), and *Gabelli*, 133 S. Ct. at 1220–21.

In *Graham*, the Honorable Lawrence King, United States District Judge for the Southern District of Florida, held that an injunction barring future violations of securities laws and a disgorgement order would be "penalties" subject to § 2462's statute of limitations. 21 F. Supp 3d at 1310–11. In *Graham*, all of the alleged wrongdoings had occurred outside of § 2462's five-year limitations period, which was the heart of Judge King's ruling. *Id.* at 1305. Relying

heavily on the Supreme Court's decision in *Gabelli*, which reaffirmed the fundamental importance and necessity of statutes of limitations, Judge King rejected the notion that equitable remedies for violations of securities laws might *not* be subject to § 2462 and thus might have no statute of limitations. *Id.* at 1310–11. He reasoned that under *Gabelli*, there simply must be *some* method of repose. After all, finding that § 2462 did not apply to equitable remedies "would make the Government's reach to enforce such claims akin to its unlimited ability to prosecute murderers and rapists." *Id.* at 1310. Accordingly, he found that enjoining the defendants from any future violations of securities laws "can be regarded as nothing short of a penalty 'intended to punish,' especially where [there was] no evidence (or allegations) of any continuing harm or wrongdoing [within the limitations period]." *Id.* at 1310. With respect to the proposed disgorgement order, Judge King found that it would be essentially the same as a civil penalty (which is clearly subject to § 2462) because ordering the disgorgement of all ill-gotten gains would be tantamount to a forfeiture. *Id.* at 1310–11.

Although the *Graham* opinion does not expressly mention the term, Judge King's reasoning is referred to as the concurrent remedy rule. "The concurrent remedy rule provides: when legal and equitable relief are available concurrently (*i.e.*, when an action at law or equity could be brought on the same facts), equity will withhold its relief in such a case where the applicable statute of limitations would bar the concurrent legal remedy." *United States v. Telluride Co.*, 146 F.3d 1241,

1249 n.12 (10th Cir. 1998) (internal quotation marks omitted) (citing *Cope v. Anderson*, 331 U.S. 461, 464 (1947)). As Plaintiff points out, the Tenth Circuit has spoken on this issue and has reached a different result than *Graham*. *Id.*

In *Telluride*, the Tenth Circuit held that equitable remedies *are* available to the government even where legal relief on the same facts is barred by the statute of limitations. *Id.* at 1248–49. The court explained that "a suit by the United States in its governmental capacity is not subject to a time limitation unless Congress explicitly imposes one and any statute of limitations sought to be applied against the United States must receive a strict construction in favor of the Government." *Id.*

In addition to rejecting the concurrent remedy rule, the court also determined whether the equitable relief sought—enjoining the defendant from continuing to illegally fill wetlands and requiring the defendant to restore damaged wetlands or create new wetlands to replace those that could not be restored—amounted to a penalty and, thus, whether § 2462 applied. *Id.* at 1243, 1245–46. The court held that the injunction did not constitute a penalty under § 2462 because it sought only to restore the damaged wetlands. *Id.* at 1246. It "did not seek compensation unrelated to or in excess of the damage caused by the defendant's acts." *Id.*

On careful analysis of the case law, this Court is not persuaded that the reasoning in *Graham* should apply here. First, *Graham* is factually distinct. In *Graham*, none of the alleged wrongdoing had occurred within the limitations period. Here, however, the Court has found

that some of Defendant's wrongs did occur within the limitations period. Therefore, even if the concurrent remedy rule were to apply in this case, it would not preclude all equitable relief. Second, the Court finds *Graham* to be an outlier. Plaintiff cites numerous cases in which other courts have addressed, and rejected, *Graham's* reasoning. *See* [Doc. 181] at 10 (collecting cases). Finally, and most importantly, this Court is bound by *Telluride* and, accordingly, shall not apply the concurrent remedy rule.

Graham and the concurrent remedy rule notwithstanding, Defendant still argues that the injunction and disgorgement sought in this case are actually "penalties" subject to § 2462. A permanent injunction or a disgorgement order would be a punitive measure, and thus subject to § 2462, if it is imposed as "a form of punishment" that "goes beyond remedying" the damage allegedly caused by the defendant. *Johnson v. SEC*, 87 F.3d 484, 488 (D.C. Cir. 1996). A § 2462 penalty is a "sanction or punishment imposed for violating a public law which goes beyond compensation for the injury caused by the defendant." *Telluride*, 146 F.3d at 1246. In other words, there may be a penalty where the "sanction seeks compensation unrelated to, or in excess, of the damages caused by the defendant." *Id.*

i. Injunction

Defendant urges the Court to ignore *Telluride* in determining whether the proposed injunction would amount to a penalty. Defendant argues that the injunction would constitute a penalty because there is minimal likelihood that the injunction would restore the

status quo ante Defendant's wrongs, and because there is "no reasonable prospect of future harm." [Doc. 179] at 9–10; *see SEC v. Jones*, 476 F. Supp. 2d 374, 384 (S.D.N.Y. 2007) (holding that where the SEC adduced no positive proof, aside from the defendants' past wrongdoing, to suggest some cognizable danger of recurrent violation, an injunction barring future violations of securities laws would constitute a "penalty" under § 2462).

The Court is not persuaded. The Court finds that the requested injunction—barring Defendant from any future violations of the securities laws—is not a penalty under § 2462 because it does not seek compensation unrelated to or in excess of the damage caused by Defendant. *See Telluride*, 146 F.3d at 1246. In fact, enjoining Defendant from future securities-laws violations is precisely tailored to Defendant's wrongs.

Additionally, even assuming *arguendo* that the injunction were a penalty, § 2462 would not bar it. Because the Court finds that some of Defendant's violations occurred within the five-year window, injunctive relief—even if tantamount to a "penalty"—would not be barred by the statute of limitations.

Even though the Court has found that the injunction requested in this case is not a penalty and is not barred by the statute of limitations, those findings do not mean, *ipso facto*, that an injunction is warranted. "An injunction based on the violation of securities laws is appropriate if the SEC demonstrates a reasonable and substantial likelihood that the defendant, if not enjoined, will violate securities laws in the future."

SEC v. Pros Int'l, Inc., 994 F.2d 767, 769 (10th Cir. 1993). The relevant factors for determining the likelihood of future violations are the seriousness of the violation, the degree of scienter, whether the defendant's occupation will present opportunities for future violations, and whether the defendant has recognized his wrongful conduct and gives sincere assurances against future violations. *Id.* While no single factor is determinative, "the degree of scienter bears heavily on the decision." *Id.*

The first factor, the seriousness of Defendant's violations, was established at trial. Defendant was found liable for numerous "knowing" violations of securities laws, and the circumstances were egregious. He misappropriated nearly $35 million over an 11-year period, abusing his roles in several adviser and investment firms for his own personal benefit and to the detriment of investors. He specifically targeted smaller investors (those investing $5,000 or less) because they would be less likely to sue if they discovered his schemes. *See* Trial Transcript dated Nov. 4, 2014 [Doc. 163] at 43–44. Based on these circumstances, the Court finds that Defendant's violations were quite serious. Consequently, this factor weighs in favor of an injunction.

The second factor, Defendant's degree of scienter, also weighs in favor of an injunction. Scienter, according to the Supreme Court, is knowing or intentional misconduct designed to deceive or defraud investors. *Rolf*, 570 F.2d at 45 (citing *Ernst & Ernst*, 425 U.S. at 199); *see also Wall Street Pub.*, 591 F. Supp. at 1084 (scienter established by showing intentional,

knowing, or reckless conduct resulting in the alleged fraud or deceit). Tenth Circuit authority has reasoned that illegal conduct that is knowing and willful satisfies the scienter requirement. *Edward J. Mawod & Co.*, 591 F.2d 588.

Defendant is highly educated and by all accounts highly intelligent and knowledgeable about advising and investing. The jury found that his violations were committed "knowingly." [Doc. 174]. These circumstances, coupled with the vast extent of the fraud, tend to show that Defendant acted with a high degree of scienter.

The third factor is whether Defendant's occupation will present opportunities for future violations. Defendant testified at trial that he owned and controlled investment-adviser firms and operated investment companies for decades. [Doc. 165] at 48–58; [Doc. 166] at 38–69. He holds a law degree and a master's degree in business administration. At trial, he expounded on his vast business experience, knowledge, and training in business formation and securities markets. *Id.* Defendant attests that he does not intend to engage in business activity that would present opportunities for future violations, citing his age (67 years old), his alleged insolvency, loss of his residence in foreclosure proceedings, and "fundamental market changes" precluding investment opportunities in high tech initial public offerings. [Doc. 180]. However, his occupation has historically been in business formation and securities markets. *Id.* Moreover, the evidence at trial establishes that Defendant has been accustomed to an extravagant lifestyle, and in light of his demeanor,

the Court is not persuaded that Defendant would refrain from pursuing a business opportunity that could lead to violating the securities laws. Although Defendant attests that he is not currently employed, [Doc. 180] at 3, the Court finds this third factor favors issuance of an injunction.

The final factor the Court considers is whether Defendant has recognized his wrongful conduct or given assurances against future violations. Even in the face of a unanimous jury verdict, Defendant has not recognized his wrongful conduct. Defendant's Declaration, [Doc. 180], filed concurrently with his Response, [Doc. 179], blames the dissolution of the Funds on market conditions and certain market collapses. *Id.* Defendant also blames the "profound changes in the capital markets" since 2000 for his financial circumstances rather than take any responsibility for his own conduct. [Doc. 179] at 9. His claims that he does not intend to engage in his prior business activities are self-serving. Defendant has not recognized his wrongful conduct, nor has he given any credible assurances against future violations. Therefore, the final factor also weighs in favor of an injunction.

All of the factors set forth by the Tenth Circuit weigh in favor of issuing a permanent injunction. Therefore, the Court finds that there is a reasonable and substantial likelihood that Defendant will again violate the securities laws. Accordingly, an injunction is warranted and shall issue.

ii. Disgorgement

The question of disgorgement is slightly different from the question of an injunction. Although the Court finds that some of the violations occurred within the five-year period, not all did. Nevertheless, Plaintiff requests disgorgement of all funds that were misappropriated, even those outside the five-year window. Therefore, the Court first analyzes whether disgorgement in this case would constitute a penalty such that § 2462 would apply. Finding that it does not apply, the Court next evaluates whether and to what extent disgorgement is warranted.

a. Disgorgement in this case is not a penalty.

In *Telluride*, the Tenth Circuit explained that an equitable remedy, like disgorgement, would not amount to a "penalty" under § 2462 where it "did not seek compensation unrelated to or in excess of the damage caused by the defendant's acts." 146 F.3d at 1246. The court specifically described disgorgement as "remedial" even though it "sanction[s] past conduct. *Id.* at 1247. Under *Telluride*, equitable disgorgement should apply to "ill-gotten gains earned by the defendant while in violation of securities laws." *Id.* (internal quotation marks omitted).

Nevertheless, relying upon other, out-of-circuit cases, namely *Johnson*, *Bartek*, and *Commonwealth Chemical*, Defendant urges the Court to find that disgorgement would constitute a penalty because of the "crushing financial consequences" to Defendant, and because there is no evidence of the likelihood of

recurrence of violations. [Doc. 179] at 10. Therefore, Defendant argues that no equitable purpose could be served by ordering disgorgement of all of the misappropriated funds, including those taken outside the five-year window. *Id.*

However, neither *Johnson* nor *Bartek* nor *Commonwealth Chemical* supports his position. Disgorgement was not at issue in any of these cases. *See Johnson* 87 F.3d at 491; *Bartek*, 484 F.App'x at 950–57; *SEC v. Commonwealth Chem. Sec., Inc.*, 574 F.2d 90, 95–96, 102 (2d Cir. 1978). In fact, the *Johnson* court refers to "disgorgement of ill-gotten gains" to illustrate a "strictly remedial" measure without respect for the consequences of disgorgement on the defendant. *Johnson* 87 F.3d at 491. Disgorgement is not mentioned at all in *Bartek*. And the court in *Commonwealth Chemical* seems to suggest that the effect of a disgorgement order on a defendant is irrelevant to its equitable nature. 574 F.2d at 96. The authorities cited by Defendant actually seem consistent with the rule in *Telluride*. Applying the *Telluride* rule, the Court finds that the disgorgement sought by Plaintiff is remedial, equitable, and thus, not subject to § 2462.

Defendant makes one final argument as to why disgorgement amounts to a penalty. He states in his Response (with no citation to authority) that an order for disgorgement of funds paid to third parties, instead of paid directly to Defendant, would constitute a penalty. [Doc. 179] at 2. The implication is that Defendant should not be ordered to disgorge funds that were paid to landlords or other controlling persons to whom Defendant was not related. *See id.* Plaintiff

replies that the question is not what amount of illegally obtained funds was *received* by Defendant but, rather, what amount of illegally obtained funds was *distributed* under Defendant's control. [Doc. 181] at 11 (citing *United Amer. Ventures*, 2012 U.S. Dist. LEXIS 51978, at *16).

A "person who controls the distribution of illegally obtained funds is liable for the funds he or she dissipated as well as the funds he or she retained." *United Amer. Ventures*, 2012 U.S. Dist. LEXIS 51978, *16 (quoting *S.E.C. v. Platforms Wireless Int'l Corp.*, 617 F.3d 1072, 1098 (9th Cir. 2010)). Moreover, defendants "should not be allowed to deduct referral fees, payroll, or other expenses from the net proceeds to reduce their liability for ill-gotten gains, because it would be 'unjust to permit the defendants to offset against investor dollars the expenses of running the very business created to defraud those investors.'" *Id.* at *17 (quoting *SEC v. JT Wallenbrock & Assocs.*, 440 F.3d 1109, 1114 (9th Cir. 2006) (ellipsis omitted). These rules make sense considering that disgorgement is designed both to prevent the wrongdoer's unjust enrichment and to deter others' violations of the securities laws, especially in cases of securities fraud. *See United States v. Nacchio*, 573 F.3d 1062, 1080 (10th Cir. 2009).

Defendant's argument—that any disgorgement of monies that he distributed to third parties would not be equitable—holds water only on the most superficial review. The Court is persuaded that *all* of the funds misappropriated by Defendant should be disgorged. Requiring Defendant to give up his ill-gotten

gains—even those he received many years ago and those he caused to be paid to third parties—is quintessentially equitable. The requested disgorgement is for the precise damage caused by Defendant's acts and, thus, does not amount to a penalty. Therefore, the limitations period in § 2462 does not apply to the request for disgorgement.

b. Disgorgement in the amount of $34,927,329 is appropriate.

Although disgorgement does not amount to a penalty in this case and is not barred by the statute of limitations, the Court must still evaluate whether and what amount of disgorgement is appropriate. Plaintiff argues that Defendant should be ordered to disgorge all of the profits causally connected to his violations. [Doc. 176] at 8 (citing *First Pacific Bancorp*, 142 F.3d at 1192 n.6.). Plaintiff contends that such order would total $34,927,329. *Id.*

Disgorgement is "an equitable remedy as to which a trial court is vested with broad discretionary powers." *SEC v. Maxxon, Inc.*, 465 F.3d 1174, 1179 (10th Cir. 2006). When the Court is calculating the proper amount of disgorgement for violation of securities laws, it need not make "an exact calculation of the defendant's profits, but only a reasonable approximation of profits causally connected to the violation. Because such calculations are not capable of exactitude, any risk of uncertainty in calculating disgorgement should fall on the wrongdoer whose illegal conduct created that uncertainty." *S.E.C. v. Haligiannis*, 470 F. Supp. 2d 373, 384 (S.D.N.Y. 2007) (internal quotations and modifications omitted); *see SEC v. Fisher*, 2008 US

Dist. LEXIS 37838, at *25 (N.D. Ill. May 13, 2008) (unpublished) (holding that disgorgement of all ill-gotten gains would be available if the SEC "prove[d] that its disgorgement figure reasonably approximate[d] the amount of unjust enrichment")).

In this case, the Court is satisfied that $34,927,329 reasonably approximates the ill-gotten gains causally connected to Defendant's violations. Indeed, Defendant does not argue otherwise. He argues that portions of the amount should not be ordered disgorged for other reasons, which have already been addressed above. However, he does not dispute the calculation. The Court will order Defendant to disgorge $34,927,329, plus prejudgment interest of $18,077,103.37.

III. CONCLUSION

The statute of limitations at 15 U.S.C. § 2462 applies to the civil money penalty and, thus, limits the total amount of penalty the Court may impose. However, because some of the claims first accrued within the limitations period, § 2462 does not bar a civil money penalty in its entirety. In light of the facts and circumstances, the Court finds that a third-tier, civil money penalty should be imposed against Defendant in the amount of $2,354,593.

The Court further finds that neither injunction nor disgorgement, as Plaintiff requests, amounts to a "penalty" in this case because neither is unrelated to, or in excess, of the damages caused by Defendant. In fact, they are tailored to the injury caused by Defendant. Therefore, neither injunction nor disgorgement is subject to the statute of limitations at § 2462.

There is a reasonable and substantial likelihood that Defendant, if not enjoined, will violate securities laws in the future. Accordingly, he will be permanently enjoined from violating the securities laws. Finally, the Court determines that $34,927,329 reasonably approximates the ill-gotten gains causally connected to Defendant's violations and will order him to disgorge that amount plus prejudgment interest of $18,077,103.37.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Plaintiff's Motion for Entry of Final Judgment against Defendant Charles R. Kokesh [Doc. 176] is **GRANTED.**

IT IS FURTHER ORDERED that Defendant shall pay a civil penalty in the amount of $2,354,593 pursuant to Section 21(d) of the Exchange Act, Section 209(e) of the Advisers Act, and Section 42(e) of the Investment Company Act, 15 U.S.C. §§ 78u(d); 80b-9(e), and 80a-41(e), **within 30 days** of entry of this Order.

IT IS FURTHER ORDERED that a permanent injunction will issue enjoining Defendant from violating Section 206(1) and (2) of the Investment Advisers Act; Section 13(a) of the Exchange Act and Exchange Act Rules 12b-20, 13a-1, and 13a-13; Section 14(a) of the Exchange Act and Exchange Act Rule 14a-9; Section 37 of the Investment Company Act, and Section 205(a) of the Investment Advisers Act, directly or indirectly.

IT IS FURTHER ORDERED that Defendant shall disgorge $34,927,329, together with prejudgment interest thereon in the amount of $18,077,103.37, within 30 days of entry of this Order.

IT IS SO ORDERED.

/s/
STEPHAN M. VIDMAR
United States Magistrate Judge
Presiding by Consent

No. 16-529

IN THE
Supreme Court of the United States

CHARLES R. KOKESH,
Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

CLINTON W. MARRS
MARRS GRIEBEL LAW, LTD.
1000 Gold Ave, SW
Albuquerque, NM 87102
(505) 433-3926
clinton@marrslegal.com

ADAM G. UNIKOWSKY
Counsel of Record
ZACHARY C. SCHAUF
JENNER & BLOCK LLP
1099 New York Ave., NW,
Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

The Government agrees with Petitioner that the petition for a writ of certiorari should be granted. This Court has frequently granted certiorari in cases where the federal government, as respondent, has supported a grant of certiorari. *See, e.g.*, *Mathis v. United States*, No. 15-6092, 136 S. Ct. 894 (2016); *Bruce v. Samuels*, No. 14-844, 135 S. Ct. 2833 (2015); *Menominee Indian Tribe of Wisconsin v. United States*, No. 14-510, 135 S. Ct. 2927 (2015); *Mach Mining, LLC v. EEOC*, No. 13-1019, 134 S. Ct. 2872 (2014). Moreover, Petitioner has not located any case in which the Court has denied a petition for a writ of certiorari when the federal government, as respondent, has supported a grant. Accordingly, the Court should grant certiorari in this case.

Petitioner will respond briefly to the Government's equally brief discussion of the merits. First, disgorgement is a "penalty." It is a legal obligation to pay money to the government, imposed as a consequence of wrongdoing—a classic form of punishment. The Government analogizes this case to *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), and *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390 (1940), Gov't Br. 8, but those cases are very different. In *Porter*, a landlord was directed to return excess rents *to the tenants who paid them*. 328 U.S. at 402. The Court emphasized that the court was not ordering the landlord to pay "penalties which go to the United States Treasury" but was instead "ordering the return of that which rightfully belongs to the purchaser or tenant." *Id.* Similarly, in *Sheldon*, a copyright infringer was directed to pay profits from the

infringement *to the copyright owner*. 309 U.S. at 400-01. In those cases, the restitution order had the remedial effect of restoring property to its rightful owner. Here, by contrast, Petitioner was ordered to pay a money judgment to the government as a consequence of wrongdoing.

Second, disgorgement is a "forfeiture." The Government's brief discussion takes contradictory positions. It first argues that the term "forfeiture" refers to "something imposed in a punitive way." Gov't Br. 8 (citation omitted). But it then argues that the term "forfeiture" refers to *in rem* forfeitures which were imposed "without regard to the culpability of the property's owner," Gov't Br. 8-9—an apparent acknowledgement that "forfeiture" encompasses remedies that are *not* punitive, because the very definition of a punitive remedy is a remedy imposed as a consequence of culpability. Rather than impose artificial and contradictory limits on the term "forfeiture," the Court should hold that the disgorgement order here was a "forfeiture" under the ordinary meaning of that term.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

CLINTON W. MARRS
MARRS GRIEBEL LAW, LTD.
1000 Gold Ave, SW
Albuquerque, NM 87102
(505) 433-3926
clinton@marrslegal.com

ADAM G. UNIKOWSKY
Counsel of Record
ZACHARY C. SCHAUF
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

No. 16-529

IN THE

Supreme Court of the United States

CHARLES R. KOKESH,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

KATE COMERFORD TODD
STEVEN P. LEHOTSKY
JANET GALERIA
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

MATTHEW T. MARTENS
Counsel of Record
BENJAMIN NEADERLAND
JOHN BYRNES
SEAN DUDDY
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
matthew.martens@wilmerhale.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. SECTION 2462'S FIVE-YEAR LIMITATIONS PERIOD APPLIES TO DISGORGEMENT 4

A. Disgorgement Is Punitive, And Therefore In The Nature Of A Penalty 5

B. Disgorgement Is A Type Of "Forfeiture" 9

C. The SEC's Position Is Undermined By The Contradictory Position It Has Advanced In The Bankruptcy Context 11

II. THE COURT OF APPEAL'S READING OF § 2462 EXPOSES BUSINESS TO UNCERTAIN AND UNFAIR LIABILITY 14

A. Excluding Disgorgement From § 2462 Imposes A Permanent Cloud Of Liability On Businesses 14

B. Delayed Enforcement Actions Unfairly Increase The Burden On Businesses To Disprove Damages 17

CONCLUSION 19

TABLE OF AUTHORITIES

CASES

Page(s)

Bennis v. *Michigan*, 516 U.S. 442 (1996) 10

Blue Shield of Virginia v. *McCready*, 457 U.S. 465 (1982) 6

Calero-Toledo v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) 10

Christianson v. *Colt Industries Operating Corp.*, 486 U.S. 800 (1988) 12

FTC v. *Bronson Partners, LLC*, 654 F.3d 359 (2d Cir. 2011) 8

Gabelli v. *SEC*, 133 S. Ct. 1216 (2013) 4, 17

HUD v. *Cost Control Marketing & Sales Management of Virginia, Inc.*, 64 F.3d 920 (4th Cir. 1995) 12

In re Jensen, 395 B.R. 472 (Bankr. D. Colo. 2008) 12

In re Telsey, 144 B.R. 563 (Bankr. S.D. Fla. 1992) 12

In re Towers, 162 F.3d 952 (7th Cir. 1998) 12

Johnson v. *SEC*, 87 F.3d 484 (D.C. Cir. 1996) 5

Kennedy v. *Mendoza-Martinez*, 372 U.S. 144 (1963) 5

Northcross v. *Board of Eduction of Memphis City Schools*, 412 U.S. 427 (1973) 13

Order of Railroad Telegraphers v. *Railway Express Agency, Inc.*, 321 U.S. 342 (1944) 3

TABLE OF AUTHORITIES—Continued

Page(s)

PHH Corp. v. *CFPB*, — F.3d —, 2016 WL 5898801 (D.C. Cir. Oct. 11, 2016) 16, 17

Riordan v. *SEC*, 627 F.3d 1230 (D.C. Cir. 2010) ... 2, 4, 15

Rotella v. *Wood*, 528 U.S. 549 (2000) 3

SEC v. *Cavanagh*, 445 F.3d 105 (2d Cir. 2006) 8

SEC v. *Colello*, 139 F.3d 674 (9th Cir. 1998) 13

SEC v. *Contorinis*, 743 F.3d 296 (2d Cir. 2014) 6, 7, 11

SEC v. *First City Financial Corp.*, 890 F.2d 1215 (D.C. Cir. 1989) 5, 9, 18

SEC v. *Graham*, 823 F.3d 1357 (11th Cir. 2016) 4

SEC v. *Life Partners Holdings, Inc.*, 71 F. Supp. 3d 615 (W.D. Tex. 2014) 15

SEC v. *Manor Nursing Centers, Inc.*, 458 F.2d 1082 (2d Cir. 1972) 6

SEC v. *Merchant Capital, LLC*, 397 F. App'x 593 (11th Cir. 2010) 13

SEC v. *Palmisano*, 135 F.3d 860 (2d Cir. 1998) 11

SEC v. *Rind*, 991 F.2d 1486 (9th Cir. 1993) 5

SEC v. *Tambone*, 550 F.3d 106 (1st Cir. 2008) 4

SEC v. *Teo*, 746 F.3d 90 (3d Cir. 2014) 7, 11, 15, 18

SEC v. *Texas Gulf Sulphur Co.*, 258 F. Supp. 262 (S.D.N.Y. 1966) 14

SEC v. *Wills*, 472 F. Supp. 1250 (D.D.C. 1978) 7

SEC v. *Wyly*, 56 F. Supp. 3d 260 (S.D.N.Y. 2014) 2, 15

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. *Kubrick*, 444 U.S. 111 (1979) 17, 18

United States v. *Loud Hawk*, 474 U.S. 302 (1986) 18

United States v. *Tilley*, 18 F.3d 295 (5th Cir. 1994) 10

United States v. *U.S. Coin & Currency*, 401 U.S. 715 (1971) 11

United States v. *Ursery*, 518 U.S. 267 (1996) 10

United States v. *Ward*, 448 U.S. 242 (1980) 5

United States v. *Warshak*, 631 F.3d 266 (6th Cir. 2010) 11

Zacharias v. *SEC*, 569 F.3d 458 (D.C. Cir. 2009) 15

STATUTES AND REGULATIONS

11 U.S.C. § 523 11

15 U.S.C.
§ 78k 13
§ 78n 13
§ 78r 13
§ 7246 8

28 U.S.C. § 2462 ..... *passim*

17 C.F.R. pt. 201 14

17 C.F.R. § 201.1100 8

68 Fed. Reg. 45,820 (Aug. 4, 2003) 16

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES

Black's Law Dictionary (10th ed. 2014) 9, 10

Black's Law Dictionary (4th ed. 1951) 9

Dissenting Statement of Commissioner Maureen K. Ohlhausen, File No. 101-0006 (Apr. 17, 2015), https://www.ftc.gov/system/files/documents/public_statements/637761/150420cardinalhealthohlhausen.pdf 16

FTC, Statement of the Commission (July 31, 2012), https://www.ftc.gov/system/files/documents/public_statements/296171/120731commstmt-monetaryremedies.pdf 16

IRS, Office of Chief Counsel, Memorandum, No. 201619008 (May 6, 2016), https://www.irs.gov/pub/irs-wd/201619008.pdf 12

Kull, Andrew, *Restitution's Outlaws*, 78 Chi.-Kent L. Rev. 17 (2003) 8

Restatement (Third) of Restitution and Unjust Enrichment (2011) 9

Roach, George, *A Default Rule of Omnipotence: Implied Jurisdiction and Exaggerated Remedies in Equity for Federal Agencies*, 12 Fordham J. Corp. & Fin. L. 1 (2007) 10

SEC, Press Release No. 2016-203, *OCH-Ziff Hedge Fund Settles FCPA Charges* (Sept. 29, 2016), https://www.sec.gov/news/pressrelease/2016-203.html 6

TABLE OF AUTHORITIES—Continued

Page(s)

SEC, Press Release No. 2013-182, *SEC Charges 23 Firms With Short Selling Violations in Crackdown on Potential Manipulation in Advance of Stock Offerings* (Sept. 17, 2013), https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370539804376 14

SEC, Press Release No. 2005-93, *SEC Charges Individuals with Fraudulent Scheme to Obtain Stock in Newalliance Bankshares IPO* (June 28, 2005), https://www.sec.gov/news/press/2005-93.htm 6

SEC, *Report Pursuant to Section 308(c) of the Sarbanes Oxley Act of 2002* (2003), https://www.sec.gov/news/studies/sox308creport.pdf 7, 14

SEC, *Select SEC and Market Data Fiscal 2015*, www.sec.gov/reportspubs/select-sec-and-market-data/secstats2015.pdf (last visited Nov. 18, 2016) 14

Webster's Collegiate Dictionary (5th ed. 1946) 9

INTEREST OF AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

The Chamber's members recognize that the appropriate exercise of enforcement powers by the SEC and other agencies is important for ensuring that financial and other markets function fairly and effectively. As Congress has established, however, those enforcement powers must be checked by reasonable statutes of limitation and repose that apply as strongly to punitive disgorgement as to other fines, penalties, and forfeitures. Regardless of its particular form, the cloud of potential liability hampers business and investment activity, and long-belated enforcement actions are less likely to protect or help market participants. The Court should grant certiorari to address this important issue.

---

[1] No counsel for a party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties to this matter have consented to submission of this brief.

SUMMARY OF ARGUMENT

In October 2009, the SEC filed suit against Petitioner seeking, among other things, "disgorgement" of ill-gotten gains from alleged securities law violations. Pet. App. 2a. After a trial more than five years later (in November 2014), the district court ordered that Petitioner disgorge approximately $35 million, of which approximately $30 million was the result of conduct that occurred more than five years before the SEC's complaint was filed. *Id.* 45a; Dist. Dkt. 181 at 2. The district court further ordered that Petitioner pay $18 million in prejudgment interest on the disgorgement award. Pet. App. 45a. Petitioner argued that he should not be faced with crippling monetary penalties based on conduct occurring as much as fourteen years before the SEC filed suit (and twenty years before the matter was finally litigated).

The SEC responded that there is *no* statute of limitations for "disgorgement" claims. Pet. App. 41a. According to the SEC, disgorgement is not a "fine, penalty, or forfeiture" subject to the five-year statute of limitations set out in 28 U.S.C. § 2462. The SEC's position here is not unique to this case. The SEC regularly brings enforcement actions seeking disgorgement for decades-old conduct. *See, e.g.*, *Riordan* v. *SEC*, 627 F.3d 1230, 1234 (D.C. Cir. 2010) (imposing disgorgement in case where "substantial portion" of conduct took place as long as ten years before the SEC brought its action); *SEC* v. *Wyly*, 56 F. Supp. 3d 260, 270 (S.D.N.Y. 2014) (imposing disgorgement in case involving thirteen-year course of conduct that began nearly twenty years before SEC brought its action). Yet the SEC has argued—successfully—that, for purposes of the Bankruptcy

Code, disgorgement is a "fine, penalty, or forfeiture" that is not dischargeable in bankruptcy.

Thus, in the SEC's view, a defendant in an agency enforcement action is forever liable for potentially crippling monetary awards that may never be discharged. This is an extraordinary position. Statutes of limitation "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared," *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U.S. 342, 348-349 (1944), and provide "certainty about ... a defendant's potential liabilities," *Rotella* v. *Wood*, 528 U.S. 549, 555 (2000). These fairness and certainty principles are particularly important in the case of disgorgement. Disgorgement awards generally far outstrip the statutory penalties imposed, perhaps because the courts require the government to provide only a "reasonable approximation" of ill-gotten gains to be disgorged, shifting to the defendant the burden of demonstrating, potentially decades after the fact, that the government's approximation is imprecise or inaccurate.

The concerns raised by the SEC's enforcement approach are not limited to this enforcement context. Numerous other federal agencies can and do seek disgorgement awards. Basic fairness demands that the liability risk posed by these potentially astronomical awards have an expiration date. Congress agreed in enacting § 2462, which by its terms applies to "any" penalty or forfeiture.

ARGUMENT

I. SECTION 2462'S FIVE-YEAR LIMITATIONS PERIOD APPLIES TO DISGORGEMENT

Section 2462, the default statute of limitations for federal civil enforcement actions, provides that:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued.

28 U.S.C. § 2462.

In *Gabelli* v. *SEC*, the Court recognized the applicability of § 2462 to statutory penalties imposed in SEC enforcement actions, but expressly left open the question whether disgorgement is likewise considered a "fine, penalty, or forfeiture" under that provision. 133 S. Ct. 1216, 1220 n.1 (2013). Four courts of appeals have now addressed the question, but they have differed as to the answer.[2]

The issue is ripe for resolution by this Court. As discussed below, the SEC should not be permitted to shield its enforcement actions from the statutory limitations period simply by seeking expansive disgorgement orders instead of civil penalties. This

---

[2] *Compare SEC* v. *Graham*, 823 F.3d 1357, 1364 (11th Cir. 2016) (disgorgement subject to § 2462) *with* Pet. App. 2a (disgorgement not subject to § 2462); *Riordan* v. *SEC*, 627 F.3d 1230, 1234 (D.C. Cir. 2010) (same); *SEC* v. *Tambone*, 550 F.3d 106, 148 (1st Cir. 2008) (same).

Court should grant certiorari to resolve the circuit split.

A. Disgorgement Is Punitive, And Therefore In The Nature Of A Penalty

As noted above, the five-year limitations period of § 2462 applies to actions seeking "any ... penalty." A "penalty" is "a form of punishment imposed by the government for unlawful or proscribed conduct, which goes beyond remedying the damage caused to the harmed parties by the defendant's action." *Johnson* v. *SEC*, 87 F.3d 484, 488 (D.C. Cir. 1996). A penalty is thus animated by the "traditional aims of punishment—retribution and deterrence," *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963), and is not solely intended to "'afford a private remedy to a person injured by the wrong,'" *Johnson*, 87 F.3d at 487. In determining the punitive nature of a remedy, courts look not only at the labels attached, but the "purpose or effect" of the remedy. *United States* v. *Ward*, 448 U.S. 242, 249 (1980).

To be clear, punishment need not be the sole or primary purpose of a remedy in order to be a penalty. Indeed, civil penalties—the penalties covered by § 2462—are distinguished from criminal penalties by the fact that they are not "so punitive" as to be criminal in nature. *Ward*, 448 U.S. at 249.

Disgorgement has substantial punitive aspects as well. *First*, disgorgement is animated by a deterrent purpose, which is a hallmark of punitive remedies. *See, e.g.*, *SEC* v. *Rind*, 991 F.2d 1486, 1490 (9th Cir. 1993) ("The theory behind the remedy is deterrence and not compensation."); *SEC* v. *First City Fin. Corp.*, 890 F.2d 1215, 1232 n.24 (D.C. Cir. 1989) ("[I]n the context of an SEC enforcement suit ... deterrence is the key

objective."); *SEC* v. *Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1104 (2d Cir. 1972) ("The deterrent effect of an SEC enforcement action would be greatly undermined if securities law violators were not required to disgorge illicit profits."); *see also Blue Shield of Va.* v. *McCready*, 457 U.S. 465, 473 n.10 (1982) ("Only by requiring violators to disgorge the 'fruits of their illegality' can the deterrent objectives of the antitrust laws be fully served."). This is confirmed by the SEC's public statements about its enforcement actions, which highlight the deterrent and retributive effect of its disgorgement orders. *See, e.g.*, SEC, Press Release No. 2005-93 (June 28, 2005) (in announcing settlement providing for disgorgement plus interest of $474,279 and a civil penalty of $120,000, the SEC stated that "[t]his action is a message to all those who would seek to deprive mutual bank depositors of their rightful opportunity to participate in their bank's IPO. Hopefully, the actions taken today by the SEC and the Justice Department will deter anyone considering this type of misconduct in the future."); SEC, Press Release No. 2016-203 (Sept. 29, 2016) (in announcing settlement providing for nearly $200 million in disgorgement and interest, the SEC emphasized that "[f]irms will be held accountable for their misconduct no matter how they might structure complex transactions").

Second, disgorgement goes beyond the limited goal of preventing unjust enrichment, seeking profits that have not been retained by the defendant. Most directly, courts have sanctioned efforts by the SEC to seek disgorgement of profits made by third parties. For example, in *SEC* v. *Contorinis*, 743 F.3d 296 (2d Cir. 2014), the court affirmed a disgorgement order of over $7 million, plus over $2 million in prejudgment interest, despite the fact that the defendant only made

a personal profit of $427,875 from the trades. *Id.* at 300-301. The court reasoned that the defendant "enhanced his reputation" by making profitable trades for his clients, and that therefore there was "no injustice ... in making him responsible for the profits he made for others." *Id.* at 304.[3]

Even in cases where the profits all redound to the defendant, disgorgement may be punitive in effect—particularly where enforcement is delayed. The SEC has recognized that profits from fraud are often dissipated, whether through business expenses, personal expenditures, or investment losses. SEC, *Report Pursuant to Section 308(c) of the Sarbanes Oxley Act of 2002*, at 21 (2003). As a result, disgorgement orders regularly force defendants into bankruptcy and burden them with debts that they will never be able to pay. *Id.* This may be justified, but it cannot be doubted that it operates as a harsh punishment for wrongdoing.

Third, where the SEC seeks disgorgement of amounts that cannot be calculated or traced with sufficient certainty, the request "takes on the character of a plea for punitive relief." *SEC* v. *Wills*, 472 F. Supp. 1250, 1276 (D.D.C. 1978). But this is precisely what courts allow: In estimating the amount to be disgorged, the SEC is only required to provide a "reasonable approximation." *SEC* v. *Teo*, 746 F.3d 90, 107 (3d Cir. 2014). The burden then shifts to the defendant to demonstrate that this amount is not a reasonable estimate. *Id.* By putting the entire burden of

---

[3] Notably, the SEC sought this disgorgement remedy only after it failed to obtain criminal forfeiture of these third-party profits. *Contorinis*, 743 F.3d at 300.

uncertainty on the defendant, the disgorgement remedy has the effect of punishing defendants.

Fourth, like penalties, disgorgement orders are not remedial and compensatory in purpose—disgorgement is not pegged to the losses incurred by victims and the proceeds of a disgorgement order go to the United States, not victims. *SEC* v. *Cavanagh*, 445 F.3d 105, 117 (2d Cir. 2006) ("In a securities enforcement action, as in other contexts, 'disgorgement' is not available primarily to compensate victims.").[4] Although the SEC may create "fair funds" to compensate victims, such funds are permitted only when penalties are imposed, and penalties are permitted only for violations within the five-year limitations period of § 2462. *See* 15 U.S.C. § 7246(a); 17 C.F.R. § 201.1100 (providing that disgorgement goes to alleged victims *only if* monetary penalties are also imposed). Thus, applying a five-year limitations period to disgorgement actions would not deprive victims of monetary compensation that would otherwise be available.

These punitive features of disgorgement orders are not incidental.[5] Instead, they derive from the principle that "the risk of uncertainty should fall on the

---

[4] *See also FTC* v. *Bronson Partners, LLC*, 654 F.3d 359, 373 (2d Cir. 2011) ("While agencies may, as a matter of grace, attempt to return as much of the disgorgement proceeds as possible, the remedy is not, strictly speaking, restitutionary at all, in that the award runs in favor of the Treasury, not of the victims.").

[5] *See* Kull, *Restitution's Outlaws*, 78 Chi.-Kent L. Rev. 17, 18 (2003) ("[R]estitution does not punish, but it punishes negatively: not by imposing liability on disfavored parties, nor by enhancing the liability to which disfavored parties are subject, but by denying a restitutionary claim (or counterclaim) to which the disfavored party would otherwise be entitled.").

wrongdoer whose illegal conduct created that uncertainty." *First City Fin. Corp.*, 890 F.2d at 1232; *see also id.* ("[T]he line between restitution and penalty is unfortunately blurred[.]"). This is in stark contrast to the remedy of restitution. Where restitution of illegal profits is sought from an innocent recipient, the amount of restitution is calculated "by rules that are notably solicitous of the defendant." *See Restatement (Third) of Restitution and Unjust Enrichment* § 50 cmt. f (2011). When calculated in such a way, restitution does not have the characteristics of a penalty. But in the context of a disgorgement order against a wrongdoer, as the SEC has sought here, harsher rules apply. *Id.* § 51 cmt. i. These harsher rules effectively operate as punishment for the defendant's wrongdoing, and disgorgement should accordingly be treated as a penalty under § 2462.

B. Disgorgement Is A Type Of "Forfeiture"

Disgorgement is subject to the limitations period of § 2462 for the additional reason that it is a "forfeiture." Indeed, there is no meaningful difference between disgorgement and forfeiture, both in definition and in practice.

As a matter of legal parlance, the terms forfeiture and disgorgement are interchangeable. Forfeiture has long been defined as "[t]he loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty." *Black's Law Dictionary* 765 (10th ed. 2014).[6] Fitting comfortably within that definition,

---

[6] This meaning has remained stable since § 2462 was adopted in 1948. *See Black's Law Dictionary* 778 (4th ed. 1951) (defining forfeiture as "[s]omething to which the right is lost by the commission of a crime or fault or the losing of something by way of penalty"); *Webster's Collegiate Dictionary* 393 (5th ed. 1946)

disgorgement is defined as "[t]he act of giving up something (such as profits illegally obtained) on demand or by legal compulsion." *Id.* at 568.[7] Both terms involve the giving up of property, and both terms require the property to be given up as a result of wrongdoing. Accordingly, the case law often uses the terms interchangeably. *See, e.g., United States* v. *Ursery*, 518 U.S. 267, 284 (1996) ("Forfeitures serve a variety of purposes, but are designed primarily to confiscate property used in violation of the law, and to require disgorgement of the fruits of illegal conduct.").

The underlying policies of disgorgement and forfeiture are also similar. Civil forfeiture "prevent[s] further illicit use of the conveyance and ... impos[es] an economic penalty, thereby rendering illegal behavior unprofitable." *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 687 (1974).[8] Likewise, disgorgement "operates to make the illicit action unprofitable for the

---

(defining forfeit as "[a] thing forfeited; that which is lost by a crime, offense, neglect of duty, or breach of contract; hence, a fine; a penalty").

[7] Disgorgement, in the sense used by the SEC, is a relatively recent term of art, appearing in less than a dozen published cases from 1800 to 1960, and first defined in Black's Law Dictionary after 2000. *See* Roach, *A Default Rule of Omnipotence: Implied Jurisdiction and Exaggerated Remedies in Equity for Federal Agencies*, 12 Fordham J. Corp. & Fin. L. 1, 49 (2007).

[8] *See also Bennis* v. *Michigan*, 516 U.S. 442, 452 (1996) ("[F]orfeiture also serves a deterrent purpose distinct from any punitive purpose."); *United States* v. *Tilley*, 18 F.3d 295, 300 (5th Cir. 1994) ("Consequently, instead of punishing the forfeiting party, the forfeiture of illegal proceeds, much like the confiscation of stolen money from a bank robber, merely places that party in the lawfully protected financial status quo that he enjoyed prior to launching his illegal scheme.").

wrongdoer." *Contorinis*, 743 F.3d at 301; *see also SEC* v. *Palmisano*, 135 F.3d 860, 866 (2d Cir. 1998) ("Disgorgement, like the forfeitures discussed in *Ursery*, is designed in part to ensure that the defendant not profit from his illegal acts."). Moreover, courts put the burden of uncertainty on defendants in both contexts, as a consequence of the defendant's wrongdoing. *Compare Teo*, 746 F.3d at 107 ("but-for" causation sufficient to establish amount of disgorgement) *with United States* v. *Warshak*, 631 F.3d 266, 332 (6th Cir. 2010) (affirming forfeiture of entire business's revenues, whether or not legitimate sales, because sales all resulted "directly or indirectly" from a conspiracy to commit fraud).

Applying the label of "equitable" to disgorgement provides no basis to distinguish between the effect of forfeiture and disgorgement: "In both instances, money liability is predicated upon a finding of the owner's wrongful conduct." *United States* v. *U.S. Coin & Currency*, 401 U.S. 715, 718 (1971) (finding no distinction between forfeiture and fine). From the perspective of a business, the liability is the same whether termed as a disgorgement order, or civil forfeiture. The SEC should not be able to avoid the congressionally imposed limitations period of § 2462 by resort to formality.

C. The SEC's Position Is Undermined By The Contradictory Position It Has Advanced In The Bankruptcy Context

The terms of § 2462 are mirrored in the Bankruptcy Code, which provides that debts arising from "a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit" cannot be discharged. 11 U.S.C. § 523(a)(7). Contrary to the

position it has taken with respect to § 2462, the SEC has argued—successfully—that disgorgement orders fit within the bankruptcy discharge exception. *See In re Telsey*, 144 B.R. 563 (Bankr. S.D. Fla. 1992).[9] In accepting the SEC's argument that disgorgement is a nondischargeable "fine, penalty, or forfeiture," one court explained that the "deterrence purpose" of disgorgement is "sufficiently penal to characterize the resulting debt as a 'fine, penalty, or forfeiture.'" *Id.* at 565. Similarly, the IRS has taken the position that disgorgement orders may be nondeductible, "punitive" debts where the order "serves primarily to prevent wrongdoers from profiting from their illegal conduct and deters subsequent illegal conduct." IRS, Office of Chief Counsel, Memorandum, No. 201619008, at p. 9 (May 6, 2016). The IRS noted that "cases that impose disgorgement as a discretionary equitable remedy can have similarities to some cases that impose forfeiture as required by statute." *Id.*

The government should not be permitted to pick and choose when its disgorgement orders are penalties or forfeitures by advancing contradictory interpretations of the same language in different statutes. *See Christianson* v. *Colt Indus. Operating*

---

[9] *See also, e.g., In re Towers*, 162 F.3d 952, 955 (7th Cir. 1998) ("It is easy enough to call restitution under the Illinois Consumer Fraud and Deceptive Business Practices Act 'a fine, penalty, or forfeiture.'"); *HUD* v. *Cost Control Mktg. & Sales Mgmt. of Virginia, Inc.*, 64 F.3d 920, 928 (4th Cir. 1995) ($8.65 million disgorgement order obtained by Department of Housing and Urban Development not dischargeable in bankruptcy, because government's interest in enforcing debt was "penal"); *In re Jensen*, 395 B.R. 472, 484 (Bankr. D. Colo. 2008) ($228,836 disgorgement order obtained by State of Colorado not dischargeable in bankruptcy, because of "penal and deterrence goals" of Colorado consumer protection statutes).

Corp., 486 U.S. 800, 808 (1988) ("[l]inguistic consistency" requires reading identical language in different statutes the same); *Northcross* v. *Board of Ed. of Memphis City Sch.*, 412 U.S. 427, 428 (1973) (per curiam) ("similarity of language" is "strong indication" that statutes should be interpreted together, particularly where "'the two provisions share a common raison d'etre'"). When considered together, the SEC's contradictory interpretation of these two "fine, penalty, or forfeiture" provisions would allow the SEC to impose nondischargeable monetary obligations without any time restriction and without regard to whether the defendant himself ever obtained or still holds the monies ordered disgorged. It should not be lightly assumed that Congress intended to impose such a draconian burden on securities law violators, especially given that many securities law violations require no showing of culpable intent. *See, e.g.*, 15 U.S.C. § 78n(a) (solicitation of proxies); *id.* § 78k(a) (registration of securities); *id.* § 78r(a) (misleading statements); *SEC* v. *Merch. Capital, LLC*, 397 F. App'x 593, 595 (11th Cir. 2010) (per curiam) (district court abused discretion in failing to order disgorgement, where defendants failed to register securities and made material omissions out of "mere negligence"); *SEC* v. *Colello*, 139 F.3d 674, 675 (9th Cir. 1998) ($2.6 million disgorgement order against individual defendant who was non-party to fraud).

II. The Court Of Appeal's Reading Of § 2462 Exposes Business To Uncertain And Unfair Liability

A. Excluding Disgorgement From § 2462 Imposes A Permanent Cloud Of Liability On Businesses

As a practical matter, disgorgement is the most significant of SEC remedies. Most of the monetary relief obtained by the SEC is disgorgement: In 2015, the SEC obtained $3 billion in disgorgement orders, but only $1.2 billion in civil monetary penalties. SEC, *Select SEC and Market Data Fiscal 2015*, at 2. The SEC's administrative penalties are capped well below what could be obtained through a disgorgement order. 17 C.F.R. pt. 201, subpt. E, tbl. IV (listing maximum civil monetary penalty amounts for securities law violations).

Since first asserting its right to disgorgement of ill-gotten profits in *SEC* v. *Texas Gulf Sulphur Co.*, 258 F. Supp. 262 (S.D.N.Y. 1966), the SEC has aggressively expanded its pursuit of disgorgement awards, pushing the boundaries of what disgorgement's traditional meaning can support. *See* SEC, *Report Pursuant to Sec. 308(c) of the Sarbanes Oxley Act of 2002*, at 24 (2003) (Advocating for the SEC's policy of "aggressively asserting legal arguments for disgorgement in appropriate cases" and "try[ing] to develop the law of disgorgement in a manner favoring compensation of investors"). Rather than merely requiring a defendant to return profits directly obtained through a securities violation, the SEC now views disgorgement as a means of sending a message to future violators. *See* SEC, Press Release No. 2013-182 (Sept. 17, 2013) (stating that in obtaining significant

disgorgement from twenty-three investment firms, the SEC is "sending the clear message that firms must pay the price for violations").

Many courts have been receptive to the SEC's theories, imposing harsh disgorgement orders for often long-past conduct. *See, e.g.*, *Teo*, 746 F.3d at 100-109 (ordering individual defendants to disgorge over $17 million in stock sale profits, even though the substantial majority of stock value appreciation was due to an unrelated tender offer rather than defendant's violation); *Riordan* v. *SEC*, 627 F.3d 1230, 1234 (D.C. Cir. 2010) (imposing disgorgement on an individual defendant over $1.5 million plus interest for violations, the "substantial portion" of which took place as long as ten years before the SEC brought its action); *Zacharias* v. *SEC*, 569 F.3d 458, 471 (D.C. Cir. 2009) (per curiam) (requiring individual defendants to disgorge over $6 million for illegal sales that occurred six years before the SEC commenced its action). In other cases, courts have balked at SEC disgorgement calculations. *See, e.g.*, *SEC* v. *Life Partners Holdings, Inc.*, 71 F. Supp. 3d 615, 622 (W.D. Tex. 2014) (finding SEC's proposed disgorgement of $500 million, ten times the defendant's market capitalization, "neither justified nor just," and awarding $15 million instead); *SEC* v. *Wyly*, 56 F. Supp. 3d 260, 270 (S.D.N.Y. 2014) (rejecting the SEC's proposed disgorgement of all profits—$500 million—accrued over a thirteen year period, because it "defies logic to presume that all of the rise in the value of a company's stock price over thirteen years ... is reasonably attributable to two directors' failure to disclose their trading"). But the SEC remains free to pursue its most expansive disgorgement theories in seeking a settlement.

The Tenth Circuit's decision here creates uncertainty beyond the context of the securities laws. Section 2462 applies not only to the SEC, but also many other federal agencies empowered to take enforcement action against businesses. The Federal Trade Commission, for example, has begun to rely heavily on disgorgement to penalize long-past conduct on the part of businesses. Previously, the FTC's use of monetary remedies was limited by the analytical framework set forth in its *Policy Statement on Monetary Remedies in Competition Cases*. 68 Fed. Reg. 45,820 (Aug. 4, 2003). In 2012, however, the FTC withdrew that guidance, noting that "Supreme Court jurisprudence has increased burdens on plaintiffs, and legal thinking has begun to encourage greater seeking of disgorgement." FTC, Statement of the Commission (July 31, 2012). Consistent with the new guidance, the FTC has aggressively pursued disgorgement, including for conduct outside the five-year limitations period of § 2462. *See* Dissenting Statement of Comm'r Ohlhausen (Apr. 17, 2015) (dissenting from FTC's decision in 2015 to pursue disgorgement against Cardinal Health based on its allegedly monopolistic conduct between 2003-2008—despite the lack of any clear violation and the inability to calculate damages with any certainty).

As another example, the Consumer Financial Protection Bureau—like the SEC—has taken aggressive litigation positions in an effort to avoid statutes of limitations. In *PHH Corp.* v. *CFPB*, — F.3d —, 2016 WL 5898801, at *41 (D.C. Cir. Oct. 11, 2016), which involved an effort by the CFPB to impose a $109 million penalty based on a retroactive interpretation of the law, the CFPB took the startling position that it need not comply with any statutes of limitations when enforcing the Real Estate Settlement

Procedures Act administratively. The D.C. Circuit rejected the CFPB's position, but businesses have little assurance that the CFPB will not follow the SEC's lead and shift its focus to disgorgement. Business should not be forced to trust in agencies' "prosecutorial discretion" not to bring stale cases years or decades after the fact. *Id.*

As the Court has recognized, without a statute of limitations, businesses are left "exposed to Government enforcement action not only for five years after their misdeeds, but for an additional uncertain period into the future." *Gabelli*, 133 S. Ct. at 1223; *see also United States* v. *Kubrick*, 444 U.S. 111, 117 (1979) ("'[T]he right to be free of stale claims in time comes to prevail over the right to prosecute them.'"). Disgorgement is no less significant—and, as the SEC's enforcement actions show, can be more significant—than other monetary remedies. And by pursuing aggressive theories of liability, agencies can effectively replicate the penalties that are barred by § 2462. This gamesmanship hurts businesses, flouts Congressional intent, and ultimately impedes the effective enforcement of the law. Agencies should focus their resources on fresh cases to protect market participants from ongoing misconduct.

B. Delayed Enforcement Actions Unfairly Increase The Burden On Businesses To Disprove Damages

The SEC's efforts to circumvent § 2462 are exacerbated by the permissive standard of proof for calculating disgorgement damages. A central policy of statutes of limitation is that "they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the

loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." *Kubrick*, 444 U.S. at 117. Typically, these evidentiary issues affect the ability of both the defense and the prosecution to effectively litigate. Indeed, in a criminal case, the "passage of time may make it difficult or impossible for the Government" to carry its burden of proving its case beyond a reasonable doubt. *United States* v. *Loud Hawk*, 474 U.S. 302, 315 (1986).

Not so with disgorgement. In seeking disgorgement, the SEC only needs to propose a "reasonable approximation" of the profits, which "creates a presumption of illegal profits." *Teo*, 746 F.3d at 105. The defendant may seek to show that the calculation is inaccurate, but he bears the risk of uncertainty. *Id.* Rebutting the SEC's "reasonable approximations" is already difficult for defendants. *See First City Fin. Corp.*, 890 F.2d at 1231 ("Unfortunately, we encounter imprecision and imperfect information. Despite sophisticated econometric modelling, predicting stock market responses to alternative variables is, as the district court found, at best speculative. Rules for calculating disgorgement must recognize that separating legal from illegal profits exactly may at times be a near-impossible task."). But when enforcement actions are brought years after the fact, it may be all but impossible for the defendant to trace the chain of causation and segregate legitimate profits. In effect, the defendant must bear not only the uncertainty created by his misconduct, but by the government's delay.

Accordingly, because of this reversal of the typical burdens, it is even more critical for § 2462's limitations period to apply to disgorgement.

CONCLUSION

For the foregoing reasons, the Court should grant the petition and reverse the decision of the Tenth Circuit.

Respectfully submitted.

KATE COMERFORD TODD
STEVEN P. LEHOTSKY
JANET GALERIA
U.S. CHAMBER
LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

MATTHEW T. MARTENS
Counsel of Record
BENJAMIN NEADERLAND
JOHN BYRNES
SEAN DUDDY
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 663-6000
matthew.martens@wilmerhale.com

NOVEMBER 2016

AND
BRIEFS

FILED
FEB 24 2017
THE CLERK
SUPREME COURT, U.S.

No. 16-529

IN THE
Supreme Court of the United States

CHARLES R. KOKESH,
Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF PETITIONER

CLINTON W. MARRS
MARRS GRIEBEL LAW, LTD.
1000 Gold Ave, SW
Albuquerque, NM 87102
(505) 433-3926
clinton@marrslegal.com

DAVID A. STRAUSS
SARAH M. KONSKY
JENNER & BLOCK SUPREME COURT AND APPELLATE CLINIC AT THE UNIVERSITY OF CHICAGO LAW SCHOOL
1111 E. 60th Street
Chicago, IL 60637
(773) 834-3189

ADAM G. UNIKOWSKY
Counsel of Record
ZACHARY C. SCHAUF
JENNER & BLOCK LLP
1099 New York Ave., NW,
Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

JAMES DAWSON
JENNER & BLOCK LLP
353 N. Clark St
Chicago, IL 60654

QUESTION PRESENTED

Under 28 U.S.C. §2462, any "action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued."

The question presented is:

Does the five-year statute of limitations in 28 U.S.C. §2462 apply to claims for "disgorgement"?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

A. Statutory Background 2

1. Limitations Periods for Government Enforcement Actions. 2

2. SEC "Disgorgement" Claims. 2

B. Factual Background 5

1. Petitioner's Securities-Law Violations 5

2. Lower Court Proceedings 6

SUMMARY OF ARGUMENT 8

ARGUMENT 11

I. SEC DISGORGEMENT CLAIMS SEEK "FORFEITURE." 12

A. In The Early Republic, "Forfeiture" Covered Any Order To Turn Over Money To The Government, as Sovereign, Due To A Violation Of Law. 12

B. The Novelty Of SEC Disgorgement Claims Does Not Exempt Them From §2462. 15

C. The Tenth Circuit Made Basic Textual, Historical, And Logical Errors. 19

II. SEC DISGORGEMENT CLAIMS SEEK A "PENALTY." 23

A. A Sanction Is Punitive, And Hence A "Penalty," If It Serves In Part To Punish. 23

B. SEC Disgorgement Claims Are Penalties Because They Go To The Government As A Sanction For Wrongdoing. 24

C. SEC Disgorgement Claims Are Subject To §2462 Because They Are Noncompensatory. 26

D. Section 2462 Carries Forward a Centuries-Old Legal Tradition of Guarding Against the Special Dangers of Government Enforcement Suits. 32

E. The Specific Features Of SEC Disgorgement Claims Reinforce That They Are Penalties. 35

F. The Government Has Previously, And Correctly, Argued That SEC Disgorgement Claims Are Punitive. 37

III. THE GOVERNMENT'S POSITION IS INCONSISTENT WITH THE PURPOSES OF LIMITATIONS PERIODS GENERALLY, AND §2462 SPECIFICALLY 40

A. Allowing Government Enforcement Actions To Stretch Back Forever Violates The Core Purpose Of Limitations Periods. 40

B. The Government's Position Results In A Bizarre And Indefensible Line. 43

C. The Applicable Presumption Counsels In Favor Of, Not Against, Applying §2462's Limitations Period. 46

IV. THE CHARACTERIZATION OF DISGORGEMENT AS "EQUITABLE" IS BOTH IRRELEVANT AND WRONG 49

A. Section 2462 Applies To Equitable Remedies. 49

B. Traditional Equitable Principles Would Have Required Application Of The Statute Of Limitations 53

C. If Necessary, This Court Should Hold That SEC Disgorgement Claims Are Not "Equitable" Remedies Outside §2462 56

CONCLUSION 63

TABLE OF AUTHORITIES

CASES

3M Co. (Minnesota Mining & Manufacturing) v. Browner, 17 F.3d 1453 (D.C. Cir. 1994) 2

Adams v. Woods, 6 U.S. (2 Cranch) 336 (1805) .. 19, 20

Austin v. United States, 509 U.S. 602 (1993) 14, 15, 21, 23, 24, 25, 46, 47

Backus v. Gould, 48 U.S. 798 (1849) 18

Badaracco v. Commissioner, 464 U.S. 386 (1984) 46

Badger v. Badger, 69 U.S. 87 (1864) 54

Bennis v. Michigan, 516 U.S. 442 (1996) 51, 52

Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975) 42

BP America Production Co. v. Burton, 549 U.S. 84 (2006) 46

Brady v. Daly, 175 U.S. 148 (1899) 29, 30, 31

Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989) .. 32, 33

Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) 14

Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390 (1906) 29, 30

E.I. DuPont de Nemours & Co. v. Davis, 264 U.S. 456 (1924) 46

Elmendorf v. Taylor, 23 U.S. (10 Wheat.) 152 (1825) 54

Exploration Co. v. United States, 247 U.S. 435 (1918) 56

FEC v. Williams, 104 F.3d 237 (9th Cir. 1996) 54

FEC v. Williams, 522 U.S. 1015 (1997) 54

FERC v. Barclays Bank PLC, 105 F. Supp. 3d 1121 (E.D. Cal. 2015) 43

FTC v. Bronson Partners, LLC, 654 F.3d 359 (2d Cir. 2011) 28

Gabelli v. SEC, 133 S. Ct. 1216 (2013) ..... *passim*

Goodridge v. Rogers, 39 Mass. 495 (1839) 34

Great-West Life & Annuity Insurance Co. v. Knudson, 534 U.S. 204 (2002) .. 49, 56-57, 58, 59, 60

Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308 (1999) 56, 58

Guaranty Trust Co. of New York v. United States, 304 U.S. 126 (1938) 46

Holmberg v. Armbrecht, 327 U.S. 392 (1946) 50

Huntington v. Attrill, 146 U.S. 657 (1892) 29

Johnson v. SEC, 87 F.3d 484 (D.C. Cir. 1996) 4, 52

Kansas v. Nebraska, 135 S. Ct. 1042 (2015) 59

Kelly v. Robinson, 479 U.S. 36 (1986) 9, 28, 29

In re Landsberg, 14 F. Cas. 1065 (E.D. Mich. 1870) 34

Lewis v. Marshall, 30 U.S. (5 Pet.) 470 (1831) 50

Libretti v. United States, 516 U.S. 29 (1995) 26

Lindsey v. Lessee of Miller, 31 U.S. (6 Pet.) 666 (1832) 47

Mansfield v. Ward, 16 Me. 433 (1840) 33

Meeker v. Lehigh Valley Railroad Co., 236 U.S. 412 (1915) 30

Merck & Co. v. Reynolds, 559 U.S. 633 (2010) ... 44, 45

Mertens v. Hewitt Associates, 508 U.S. 248 (1993) 52

Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288 (1960) 59

Montanile v. Board of Trustees of National Elevator Industry Health Benefit Plan, 136 S. Ct. 651 (2016) 51, 57, 59

Perrin v. United States, 444 U.S. 37 (1979) 13

Petrella v. Metro-Goldwyn-Mayer, Inc., 134 S. Ct. 1962 (2014) 50

Porter v. Warner Holding Co., 328 U.S. 395 (1946) 31, 32, 59

Raymond v. United States, 20 F. Cas. 337 (C.C.S.D.N.Y. 1876) 30

SEC v. Bartek, 484 F. App'x 949 (5th Cir. 2012) 52

SEC v. Bilzerian, 29 F.3d 689 (D.C. Cir. 1994) 22

SEC v. Cavanagh, 445 F.3d 105 (2d Cir. 2006) ... 57, 58

SEC v. Commonwealth Chemical Securities, Inc., 574 F.2d 90 (2d Cir. 1978) 27

SEC v. Contorinis, 743 F.3d 296 (2d Cir. 2014)..... 35

SEC v. First Pacific Bancorp, 142 F.3d 1186 (9th Cir. 1998) 35-36

SEC v. Fischbach Corp., 133 F.3d 170 (2d Cir. 1997)..... 25

SEC v. Graham, 823 F.3d 1357 (11th Cir. 2016)..... 4

SEC v. Lund, 570 F. Supp. 1397 (C.D. Cal. 1983)..... 3

SEC v. Penn Central Co., 425 F. Supp. 593 (E.D. Pa. 1976)..... 4

SEC v. Quan, 817 F.3d 583 (8th Cir. 2016) 59

SEC v. Rind, 991 F.3d 1486 (9th Cir. 1993) 4

SEC v. Teo, 746 F.3d 90 (3d Cir. 2014) 36, 37, 61

SEC v. Texas Gulf Sulphur Co., 312 F. Supp. 77 (S.D.N.Y. 1970), *aff'd in relevant part*, 446 F.2d 1301 (2d Cir. 1971) 3

Stearns v. Lawrence, 83 F. 738 (6th Cir. 1897)..... 30

Taylor v. United States, 44 U.S. (3 How.) 197 (1845) 14

In re Telsey, 144 B.R. 563 (Bankr. S.D. Fla. 1992)..... 37

Tull v. United States, 481 U.S. 412 (1987)..... 58, 59

Union Bank of Louisiana v. Stafford, 53 U.S. 327 (1851) 53

U.S. HUD v. Cost Control Marketing & Sales Management of Virginia, Inc., 64 F.3d 920 (4th Cir. 1995) 37, 38

United States v. Bajakajian, 524 U.S. 321 (1998) 14, 15, 18, 21, 23, 24, 25

United States v. Banks, 115 F.3d 916 (11th Cir. 1997) 54

United States v. Brockamp, 519 U.S. 347 (1997) 51

United States v. EME Homer City Generation, L.P., 727 F.3d 274 (3d Cir. 2013) 43

United States v. Maillard, 26 F. Cas. 1140 (S.D.N.Y. 1871) 15

United States v. Mayo, 26 F. Cas. 1230 (C.C.D. Mass. 1813) 47

United States v. Moore, 340 U.S. 616 (1951) 59

United States v. Roberts, 50 U.S. 501 (1850) 18

United States v. Rodgers, 466 U.S. 475 (1984) 17

United States v. Telluride Co., 146 F.3d 1241 (10th Cir. 1998) 43

United States v. Ursery, 518 U.S. 267 (1996) 22, 49

UPS, Inc. v. Mitchell, 451 U.S. 56 (1981) 48

US Airways, Inc. v. McCutchen, 133 S. Ct. 1537 (2013) 51

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. art. III, § 3 14

7 U.S.C. §13a-1(d) 25, 52
7 U.S.C. §13a-1(d)(3) 25, 52
11 U.S.C. §523(a)(7) 28
15 U.S.C. §77t(d)(2) 3
15 U.S.C. §78t-1(b)(2) 22
15 U.S.C. §78u(d)(3)(B) 18
15 U.S.C. §78u-6(a)(4)(A) 28
15 U.S.C. §78u-6(b)(1) 28
15 U.S.C. §80a-41(e)(2) 18
15 U.S.C. §80b-9(e)(2) 18
18 U.S.C. §1963(a) 16
21 U.S.C. §853(a) 16
21 U.S.C. §853(a)(1) 39
21 U.S.C. §881(a)(6) 16
26 U.S.C. §162(f) 38
28 U.S.C. §1254(1) 1
28 U.S.C. §1658(b)(2) 45
28 U.S.C. §2415 34
28 U.S.C. §2461(a) 20
28 U.S.C. §2461(b) 20
28 U.S.C. §2462 ..... *passim*
29 U.S.C. §1132(a) 51
42 U.S.C. §2000e-5(g) 51

Revised Statute §1047 (1901) 30

Act of Apr. 30, 1790, ch. 9, § 32, 1 Stat. 112, 119 ..... 2, 14, 47

Act of Feb. 28, 1839, ch. 36, § 4, 5 Stat. 321, 322 2

Act of July 31, 1789, § 25, 1 Stat. 29, 43 15

Controlled Substance Act, Pub. L. No. 91-513, tit. II, §408(a)(2), 84 Stat. 1242, 1265 (1970) 16

OTHER AUTHORITIES

17 C.F.R. § 201.1100 27

17 C.F.R. § 201.1102(b) 27

Black's Law Dictionary (10th ed. 2014) 28

4 William Blackstone, *Commentaries* 33, 57

Blackstreet Capital Management LLC, Investment Advisers Act of 1940, Release No. 4411 (June 1, 2016) 42

Brief in Opposition, *Cost Control Market & Sales Management of Virginia, Inc. v. Cisneros*, 517 U.S. 1187 (1996) (No. 95-1233), 1996 WL 33467992 38

Brief in Opposition, *Honeycutt v. United States*, 137 S. Ct. 588 (2016) (No. 16-142), 2016 WL 6519854 39

Brief of SEC, *Martin v. SEC*, 734 F.3d 169 (2d Cir. 2013) (No. 11-3011), 2012 WL 8126225 27

Brief of SEC, *SEC v. Custable*, 796 F.3d 653 (7th Cir. 2015) (No. 15-1442), 2015 WL 3383280 27

Brief of SEC, *SEC v. Silverman*, 328 F. App'x 601 (11th Cir. 2009) (No. 08-16710-FF), 2009 WL 1674430 41

Brief of SEC, *SEC v. Smith*, 646 F. App'x 42 (2d Cir. 2016) (No. 15-1314), 2015 WL 7185051 27

Alexander M. Burrill, *A New Law Dictionary* (1850) 13

Andrew Ceresney, Director of Enforcement, *Securities Enforcement Forum West 2016 Keynote Address: Private Equity Enforcement* (May 21, 2016), http://bit.ly/2kuNQBD 42

Charles Doyle, Congressional Research Service, RL 31253, *Statutes of Limitation in Federal Criminal Cases: An Overview* (2012), http://bit.ly/2jBRfPo 43

John D. Ellsworth, *Disgorgement in Securities Fraud Actions Brought by the SEC*, 1977 Duke L.J. 641 3

1 Thomas Lee Hazen, *Law of Securities Regulation* (7th ed., rev. vol. 2016) 3

Samuel Johnson et al., *Johnson's English Dictionary* (1834) 13

Kohlberg Kravis Roberts & Co. LP, Investment Advisers Act of 1940, Release No. 4131 (June 29, 2015) 42

Office of Chief Counsel, Memorandum, Section 162(f) and Disgorgement to the SEC, No. 201619008 (Jan. 29, 2016) 38

Petition For Writ of Certiorari, *FEC v. Williams*, 522 U.S. 1015 (1997) (No. 97-601), 1997 WL 33549957 61

1 John N. Pomeroy., *Pomeroy's Equity Jurisprudence* (3d ed. 1905) 50, 53

4 John N. Pomeroy, *Pomeroy's Equity Jurisprudence* (3d ed. 1905) 51

Restatement (First) of Restitution §148 (1937) . 54, 61

SEC, *Report Pursuant to Section 308(c) of the Sarbanes-Oxley Act of 2002*, http://bit.ly/2lJ2HVN 60

SEC, Select SEC and Market Data, Fiscal 2013, https://www.sec.gov/reportspubs/select-sec-and-market-data/secstats2013.pdf 5

SEC, Select SEC and Market Data, Fiscal 2016, https://www.sec.gov/reportspubs/select-sec-and-market-data/secstats2016.pdf 5

2 Joseph Story, *Commentaries on Equity Jurisprudence* (1846) 53, 57

Transcript of Oral Argument, *Gabelli v. SEC*, 133 S. Ct. 1216 (2013) (No. 11-1274) 42

1 Noah Webster, *An American Dictionary of the English Language* (1828) 13

2 Noah Webster, *An American Dictionary of the English Language* (1828) 24

OPINIONS BELOW

The opinion of the Tenth Circuit (Pet. App. 1a–19a) is reported at 834 F.3d 1158 (10th Cir. 2016). The decision of the District Court (Pet. App. 20a–47a) is unreported but is available at 2015 WL 11142470.

JURISDICTION

The judgment of the Tenth Circuit was entered on August 23, 2016. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. §2462 provides:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

STATEMENT OF THE CASE

A. Statutory Background

1. Limitations Periods for Government Enforcement Actions.

Section 2462 traces to the Founding. In 1790, the First Congress enacted a two-year limit "for any fine or forfeiture under any penal statute." Act of Apr. 30, 1790, ch. 9, §32, 1 Stat. 112, 119; *see 3M Co. (Minnesota Min. & Mfg.) v. Browner*, 17 F.3d 1453, 1458 n.7 (D.C. Cir. 1994) (identifying 1790 statute as precursor to §2462).

In 1839, Congress enacted the statute that became §2462, providing that "no suit or prosecution shall be maintained, for any penalty or forfeiture, pecuniary or otherwise, ... unless the same suit or prosecution shall be commenced within five years from the time when the penalty or forfeiture accrued." Act of Feb. 28, 1839, ch. 36, §4, 5 Stat. 321, 322. Although the statute has been amended and recodified several times, today's §2462 hews closely to the 1839 Act. *Gabelli v. SEC*, 133 S. Ct. 1216, 1219 (2013).

2. SEC "Disgorgement" Claims.

This suit concerns §2462's application to SEC claims for "disgorgement," a monetary remedy that the SEC today seeks "in the majority of its enforcement actions." BIO 10.

When Congress created the SEC in 1934, and when Congress last amended §2462 in 1948, the SEC did not have power to pursue monetary sanctions for securities violations. The SEC could only seek injunctions or

ancillary relief. *See* 1 Thomas Lee Hazen, *Law of Securities Regulation* §1.37 (7th ed., rev. vol. 2016).

Three decades later, however, the SEC began pursuing monetary sanctions under a theory it called "disgorgement." *See generally* John D. Ellsworth, *Disgorgement in Securities Fraud Actions Brought by the SEC*, 1977 Duke L.J. 641, 641 & n.1. The first success came in 1970, when the SEC persuaded the district court in *SEC v. Texas Gulf Sulphur Co.*, 312 F. Supp. 77 (S.D.N.Y. 1970), *aff'd in relevant part*, 446 F.2d 1301, 1308 (2d Cir. 1971), to impose this sanction. The court embraced the "[j]udicial willingness to imply new remedies in areas governed by federal law." *Id.* at 91. It found that "requir[ing] defendants to give up profits realized in [unlawful] transactions" would "effectuate the [securities laws'] purpose" based on the SEC's representation that this remedy would "provid[e] an effective deterrent." *Id.* at 92.

After *Texas Gulf Sulphur*, the SEC began consistently requiring wrongdoers to disgorge the proceeds of their illegal activity. And while *Texas Gulf Sulphur* ordered "restitution" in favor of injured parties, *id.* at 93, the SEC soon began demanding "disgorgement" even when it was "not feasible" to repay victims; instead, payments went to the U.S. Treasury. *See, e.g.*, *SEC v. Lund*, 570 F. Supp. 1397, 1404–05 (C.D. Cal. 1983).

In 1990, Congress authorized the SEC to seek monetary penalties in the "gross amount of pecuniary gain." *See* 15 U.S.C. §77t(d)(2). Following the statute's enactment, the SEC began using disgorgement for a new purpose: to bring enforcement actions that would

otherwise be time-barred. Before 1990, limitations issues virtually never arose in disgorgement cases, and there is no evidence the SEC pursued stale claims that could have been barred by any limitations period.[1] After 1990, however, the SEC began asserting that "disgorgement" was limitless in time, unconstrained by §2462 or any other limitations period. *See SEC v. Rind*, 991 F.2d 1486, 1490-93 (9th Cir. 1993); *Johnson v. SEC*, 87 F.3d 484, 491 (D.C. Cir. 1996).

But it was *Gabelli v. SEC*, 133 S. Ct. 1216 (2013), that caused the SEC to multiply its efforts to bring stale disgorgement claims. *Gabelli* rejected the government's request to peg limitations periods for statutory penalties to the SEC's "discovery" of wrongdoing. *Id.* at 1224. Now, the SEC's only option for seeking money judgments for violations over five years old is disgorgement. It thus has brought numerous stale disgorgement claims nationwide, leading to four appellate cases in quick succession: the Tenth and Eleventh Circuits reached conflicting conclusions in 2016,[2] while the Second and Eighth Circuits have pending cases.[3]

As the number of disgorgement cases has risen, so

---

[1] The only pre-1990 case addressing limitations issues appears to be *SEC v. Penn Central Co.*, 425 F. Supp. 593 (E.D. Pa. 1976), which rejected a laches defense. *Id.* at 599. But the opinion does not indicate that the SEC *actually* delayed in suing.

[2] *Compare* Pet. App. 1a-19a (decision below), *with SEC v. Graham*, 823 F.3d 1357, 1359 (11th Cir. 2016).

[3] *SEC v. Wyly*, No. 15-2821 (2d Cir.); *SEC v. Crawford*, No. 16-1405 (8th Cir.).

too has the amount of payments: between 2013 and 2016, disgorgement payments jumped 25%, as against only a 9% increase in penalties.[4] As a result, supposedly "ancillary" disgorgement payments now dwarf the civil penalties expressly authorized by statute—$2.8 billion in disgorgement as against only $1.27 billion in penalties.[5]

B. Factual Background

1. Petitioner's Securities-Law Violations

On October 27, 2009, the SEC filed an enforcement action alleging that, from 1995 through 2006, Petitioner violated federal securities laws by misappropriating funds. Pet. App. 3a, 21a. The SEC's claims concerned two SEC-registered investment-adviser firms—Technology Funding Ltd. ("TFL") and Technology Funding, Inc. ("TFI")—that contracted to provide investment advice to four SEC-registered business-development companies ("the Funds"). Pet. App. 2a–3a. The SEC alleged that, via TFL and TFI, Petitioner caused improper distributions from the Funds. Pet. App. 21a.

A jury found that Petitioner contravened the

---

[4] *Compare* SEC, Select SEC and Market Data, Fiscal 2016, at 2, https://www.sec.gov/reportspubs/select-sec-and-market-data/secstats2016.pdf (disgorgement of $2.809 billion and penalties of $1.273 billion) ("2016 Data"), *with* SEC, Select SEC and Market Data, Fiscal 2013, at 2, https://www.sec.gov/reportspubs/select-sec-and-market-data/secstats2013.pdf (disgorgement of $2.257 billion and penalties of $1.167 billion).

[5] 2016 Data at 2.

securities laws, based on three violations. Pet. App. 4a–5a. First, from 1995 through 2006, Petitioner impermissibly directed the treasurer of TFL and TFI to withdraw $23.8 million from the Funds to pay salaries and bonuses, including to Petitioner and others. Pet. App. 3a, 22a.

Second, from 1995 through 2006, Petitioner impermissibly directed the treasurer of TFL and TFI to withdraw $5 million to cover office rent, which went to landlords. Pet. App. 3a, 22a.

Third, in 2000, Petitioner impermissibly caused TFL and TFI to take $6.1 million in "tax distributions." Pet. App. 3a–4a. These payments went to Petitioner and others. *Id.*

The jury found Petitioner had violated the Investment Company Act of 1940, 15 U.S.C. §80a-36, and that he had aided and abetted TFL and TFI in violating the Investment Advisers Act, 15 U.S.C. §§80b-5, 80b-6(1)-(2), and the Exchange Act of 1934, 15 U.S.C. §§78m, 78n, and its implementing regulations. Pet. App. 23a–24a.

2. Lower Court Proceedings

The district court ordered Petitioner to pay a penalty of $2.4 million, equal to "the amount of funds that [Petitioner] himself received during [§2462's five-year] limitations period"—that is, after October 27, 2004. Pet. App. 31a–32a.

The SEC, however, also wished to pursue monetary sanctions for conduct "outside the five-year window" in §2462. Pet. App. 42a. It sought a $34.9 million

"disgorgement" judgment, of which $29.9 million concededly was based on violations outside the limitations period. Pet. App. 42a; *see* Reply to Opp'n to Mot. For Final J. at 2, *SEC v. Kokesh*, No. 1:09-cv-01021-SMV-LAM (D.N.M. Jan. 21, 2015), Dkt. 181. Much of this amount also concededly reflected "funds paid to third parties," including "landlords or other ... persons to whom [Petitioner] was not related." Pet. App. 42a. And this amount concededly was far greater than Petitioner could "disgorge"—Petitioner no longer had the funds he had received, and he was "insolvent," with "no prospect of recovering." Pet. App. 31a.

The court granted the SEC's request, agreeing with the SEC that no limitations period applied. Pet. App. 35a-36a. It ordered Petitioner to pay $34.9 million in disgorgement, plus $18 million in prejudgment interest. Pet. App. 45.

The Tenth Circuit affirmed. The court acknowledged that §2462 "sets a five-year limitations period for claims seeking" "'any civil ... penalty, or forfeiture.'" Pet. App. 5a–6a (quoting 28 U.S.C. §2462). The Tenth Circuit believed, however, that §2462 used "forfeiture" in a "narrow" "historical sense"—as "an in rem procedure to take 'tangible property used in criminal activity.'" Pet. App. 14a (citation omitted). It reasoned that "[w]hen the term *forfeiture* is linked in §2462 to the undoubtedly punitive actions for a *civil fine* or *penalty*, ... Congress was contemplating the meaning of *forfeiture* in this historical sense." Pet. App. 15a. The court found that the "nonpunitive remedy of disgorgement does not fit in that company." *Id.*

SUMMARY OF ARGUMENT

A five-year limitations period applies to government enforcement actions seeking "any civil fine, penalty, or forfeiture." 28 U.S.C. §2462. This limitation period applies to disgorgement because it is a "forfeiture" and a "penalty."

I. Disgorgement is a "forfeiture." At §2462's enactment, "forfeiture" was an umbrella term covering any order to turn over money to the government, as sovereign, as a result of wrongdoing. The term encompassed both remedial and punitive remedies, and remedies directed at either money or property. Disgorgement—an order to turn over the proceeds of wrongdoing to the government—falls within forfeiture's broad definition.

The Tenth Circuit concluded that disgorgement is not a forfeiture because the SEC did not bring disgorgement claims until the 1970s, long after §2462's enactment. But even though disgorgement is a type of forfeiture that did not exist in the early Republic, it remains a "forfeiture" under that term's broad definition. Congress recognized as much when, in the 1970s, it enacted statutes requiring defendants to give up tainted proceeds—and called them "forfeiture." Congress's choice matched forfeiture's history: Like modern-day disgorgement, early forfeitures had the *effect* of depriving wrongdoers of illicit proceeds, and so accomplished the same result as disgorgement today.

The Tenth Circuit also interpreted §2462 to apply only to punitive remedies. But that interpretation is inconsistent with both statutory text (which draws no

such distinction), and history (which shows that punitive and nonpunitive remedies alike were understood as "forfeitures"). Indeed, it is inconsistent with the Tenth Circuit's *own* conclusion that nonpunitive forfeitures of the instrumentalities of crime fall within §2462.

II. Disgorgement is also a "penalty." As this Court has held, a remedy is a "penalty" so long as it is partly punitive. Disgorgement qualifies. It imposes negative legal consequences because the defendant did wrong. And it deters future violations. Those are hallmarks of punishment.

Just as important is what disgorgement does *not* do: Its goal, as the SEC and courts have made clear, is not to compensate. And when a remedy imposes negative consequences on wrongdoing without compensating victims, it is a penalty. That is true because the only reason to impose that type of remedy is that the defendant's wrongdoing *deserves* sanction. This Court has held as much: criminal restitution is a "fine, penalty, or forfeiture" under federal bankruptcy law because it has a noncompensatory "focus." *Kelly v. Robinson*, 479 U.S. 36, 53 (1986). Disgorgement's noncompensatory "focus" similarly places it within §2462.

The Court has applied that same test under §2462's predecessor: Noncompensatory payments to the Treasury are subject to the statute of limitations, while compensatory payments are not. Indeed, these decisions reflect a tradition dating to Magna Carta: When the government pursues payments that will fill its own coffers, rather than compensate for loss, the

dangers of abuse are especially acute, and the need for limits is especially essential.

The government claims that disgorgement merely restores the status quo ante. That is false. Disgorgement cannot restore the status quo when payments go to the government, not victims. Disgorgement also makes defendants worse off: It requires payment of proceeds that went to third parties, and proceeds with only an attenuated link to wrongdoing.

The government itself has recognized that disgorgement is punitive in bankruptcy and tax law, where this categorization yields greater payments to the government. It remains so here. Disgorgement's nature does not change depending on which categorization will maximize government revenues in a particular case.

III. Statutes of limitations are critical to the fair enforcement of the laws. Yet the government's position would allow it to avoid the statute of limitations in almost every case. Given the SEC's practice of expanding securities laws by seeking novel judicial glosses on old rules, the potential for abuse is grave. And this unfairness arises with no justification: Other forms of backwards-looking relief are subject to statutes of limitations, including remedies that are functionally identical to disgorgement and sanctions for far worse misconduct. There is no reason to subject those remedies, but not disgorgement, to time limits.

Contra the Tenth Circuit, there is no presumption against applying a statute of limitations. Quite the

opposite. For two centuries, in government enforcement suits seeking backwards-looking monetary relief, courts have applied a presumption in *favor* of statutes of limitations.

IV. The government's position that disgorgement is an "equitable" remedy is irrelevant. Section 2462 covers legal and equitable remedies.

History also rejects the government's claim that it can avoid a limitations period by styling a remedy "equitable." Courts of equity subjected equitable remedies to time limits. They would never have allowed the government to bring backwards-looking enforcement actions with no time limit.

If the Court deems the issue relevant, it should hold that disgorgement is not "equitable" for purposes of §2462. The government analogizes disgorgement to traditional equitable restitution. But equitable restitution is a turnover of specific assets to their owner. Disgorgement compels payment from general assets to the government. The SEC's analogy to equitable restitution is particularly unpersuasive because the SEC simultaneously contends that disgorgement is *different* from equitable restitution, in order to obtain government-friendly legal rules—including the lack of a statute of limitations.

ARGUMENT

Under 28 U.S.C. §2462, a five-year limitations period applies to government enforcement actions seeking "any civil fine, penalty, or forfeiture." This list—in a statute dating from 1839, last amended in 1948—does not expressly use the word "disgorgement."

That is not a surprise: The remedy now styled "disgorgement" is a child of the 1970s.

But this remedy, though new, falls squarely within what §2462 and its predecessors have always covered. In the 19th century, "forfeiture" broadly included any order to turn over money to the government as a result of a legal violation. Likewise, a monetary sanction was a "penalty" whenever it stepped beyond compensating injured victims. Those definitions encompass SEC disgorgement judgments: They are pegged to violations of the securities laws, are pursued by the government as sovereign enforcer, and fill government coffers, without necessarily compensating injured victims. Hence, §2462 applies.

I. SEC DISGORGEMENT CLAIMS SEEK "FORFEITURE."

A. In The Early Republic, "Forfeiture" Covered Any Order To Turn Over Money To The Government, as Sovereign, Due To A Violation Of Law.

Disgorgement falls within §2462 because it is a "forfeiture." The Tenth Circuit disagreed largely because it believed that, historically, "forfeiture" had "a narrow focus" as an "in rem" and "nonpunitive" remedy "to take tangible property." Pet. App. 14a (quotation marks omitted). It thought §2462 used "forfeiture in this historical sense." Pet. App. 15a. But the Tenth Circuit got forfeiture's definition badly wrong. At §2462's enactment, "forfeiture" was an umbrella term covering any order to turn over money to the government, as sovereign, as a result of a legal

transgression—in personam or in rem, remedial or punitive. "Disgorgement" fits that definition.

1. In interpreting "forfeiture," the Court starts with what it meant to the Congress that enacted §2462's 1839 forbearer. *See Perrin v. United States*, 444 U.S. 37, 42 (1979) ("[U]nless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning ... at the time Congress enacted the statute"). In his dictionary's first edition, Webster defined "forfeiture" as "the losing of some right ... or effects, by an offense, crime, breach of condition or other act." 1 Noah Webster, *An American Dictionary of the English Language* 86 (1828). Other contemporary definitions are similar. *See, e.g.*, Alexander M. Burrill, *A New Law Dictionary* 507 (1850) (the "loss of what belongs to one, by some fault, misconduct or transgression of law" or an "involuntary or compulsory transfer or surrender, consequent upon one's own unlawful or wrongful act"); Samuel Johnson et al., *Johnson's English Dictionary* 400 (1834) (to "forfeit" is to "lose by some breach of condition" or "some offense").

These definitions readily encompass SEC disgorgement orders. Petitioner committed an "offense," "breach of condition," or "other act": He violated the securities laws. 1 Webster, *supra*, at 86. Because of this violation, Petitioner "los[t] ... effects," *id.*—the $34.9 million disgorgement. That judgment was therefore a "forfeiture," as the 1839 Act's drafters would have understood the term.

2. Lawmakers in the early Republic legislated based on the same broad definitions. Contra the Tenth

Circuit, "forfeiture" covered any obligation to pay money to the government, as sovereign, as a result of wrongdoing—including punitive or remedial sanctions, and *in rem* or *in personam* remedies.

Punitive orders directed at specific property. In England, "forfeiture" punished felons and traitors: The "convicted felon forfeited his chattels to the Crown and his lands escheated to his lord; the convicted traitor forfeited all of his property, real and personal, to the Crown." *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 682 (1974). This use of "forfeiture" was well-known in the early Republic. The Constitution prohibits this form of "forfeiture" as punishment for treason, *see* U.S. Const. art. III, §3, and the First Congress prohibited such forfeitures for felonies in the Crimes Act of 1790—the same statute that enacted the two-year statute of limitations for "forfeitures." Act of Apr. 30, 1790, ch. 9, §24, 1 Stat. at 117; *see also Austin v. United States*, 509 U.S. 602, 613 (1993).

Remedial orders directed at specific property. "Forfeiture" also referred to "statutory forfeitures of offending objects used in violation of the customs and revenue laws." *Calero-Toledo*, 416 U.S. at 682. Such "forfeitures" were familiar in England, *id.*, and the early Republic: By 1807, Congress had enacted statutes subjecting ships and cargoes involved in customs offenses, as well as vessels used to deliver slaves to foreign countries, to "forfeiture." *Id.* at 683 & nn.21-23. Such statutes were "not considered punishment." *United States v. Bajakajian*, 524 U.S. 321, 331 (1998). Rather, they were "truly ... remedial." *Taylor v. United States*, 44 U.S. (3 How.) 197, 210 (1845); *see*

Bajakajian, 524 U.S. at 331.

Punitive orders directed at a sum of money. In the early Republic, the word "forfeiture" also encompassed fines—that is, punitive orders to pay money. *See Austin*, 509 U.S. at 614 (collecting statutes from First Congress showing "'forfeit' is the word Congress used for fine"); *id.* at 614 n.7 (collecting dictionaries from the 1700s showing "'fine' was understood to include 'forfeiture' and vice versa").

Remedial orders directed at a sum of money. "Forfeiture" also referred to purely *remedial* money judgments. The First Congress enacted customs statutes requiring forfeiture of "the value of" unlawfully imported goods. *E.g.*, Act of July 31, 1789, §25, 1 Stat. 29, 43 (requirement to "forfeit and pay a sum double the value of the goods ... concealed or purchased" knowingly in violation of the customs laws). These "forfeitures ... were considered not as punishment for an offense, but rather as serving the remedial purpose of reimbursing the Government for the losses accruing from the evasion of customs duties." *Bajakajian*, 524 U.S. at 342; *see United States v. Maillard*, 26 F. Cas. 1140, 1141 (S.D.N.Y. 1871) (applying §2462's predecessor to one such statute).

These disparate "forfeitures" share a unifying characteristic: All were orders to turn over money or property to the government, as sovereign, as a result of wrongdoing. Disgorgement fits that definition.

B. The Novelty Of SEC Disgorgement Claims Does Not Exempt Them From §2462.

This history leaves one gap, which poses the

question presented here. Government enforcement actions for "disgorgement" date only from the 1970s, and none of the "forfeitures" in the early Republic *precisely* matches. So, the question is: Does disgorgement's historical novelty place it outside §2462's definition of "forfeiture"?

The answer is no. Disgorgement may be a type of forfeiture that did not exist in the early Republic, but that does not mean it is not a forfeiture. Injunctions to desegregate schools, or reform prisons, for example, were unimaginable in 1790. Yet still they are "injunctions." So too with "forfeiture."

Modern Congresses understood this point. Congress did not until the 1970s begin enacting statutes expressly targeting gains from illegal activity. But when it did, Congress called those remedies "forfeitures." In 1970, as a sanction for "continuing criminal enterprise," Congress required convicted defendants to "forfeit to the United States the profits obtained by [them] in such enterprise." Controlled Substance Act, Pub. L. No. 91-513, tit. II, §408(a)(2), 84 Stat. 1242, 1265 (1970). Today, many statutes require defendants to relinquish the "proceeds" of their crimes. All these statutes refer to that remedy as "forfeiture." *See, e.g.*, 18 U.S.C. §1963(a); 21 U.S.C. §853(a). The government also can now bring *in rem* civil actions against the proceeds of crime—which are also styled "forfeitures." *See, e.g.*, 21 U.S.C. §881(a)(6). Congress recognized that these new remedies are still "forfeitures." Disgorgement is a "forfeiture" for the same reason.

The Tenth Circuit acknowledged that, as used in

modern criminal forfeiture statutes, the word "forfeiture" includes "disgorgement-type remedies," via the mandate to forfeit "proceeds" of wrongdoing. Pet. App. 15a-16a. The court, however, dismissed these usages as reflecting an "'*expansion* of governmental power'" that did not justify applying §2462 to "remedies outside th[e] forfeiture statutes" that existed in 1839. Pet. App. 16a (citation omitted).

What the Tenth Circuit got wrong is that Congress did not limit §2462 to the "specific set of circumstances that may have precipitated its passage"—that is, specific forfeitures existing in 1839. *United States v. Rodgers*, 466 U.S. 475, 480 (1984). Rather, Congress enacted a general limitations period, which governs across the U.S. Code, and applied that statute to any "forfeiture." *See Gabelli*, 133 S. Ct. at 1219. That term's broad 1839 meaning readily fits modern disgorgement actions. Indeed, no principled definition could gerrymander "forfeiture" to *include* each of the four types of "forfeiture" that existed in the early Republic—remedial and punitive, directed at specific property or money—and *exclude* the remedy the SEC today pursues via "disgorgement."

Moreover, the assertion that modern-day forfeitures are an "expansion of governmental power" is wrong. Early Congresses were aware of the need to deprive wrongdoers of "ill-gotten gains," Pet. App. 45a. They styled the *mechanisms* for achieving this end as "forfeiture."

Early statutes deprived wrongdoers of the benefits of illegal activity by imposing forfeitures pegged to multiples of the defendant's ill-gotten gains, achieving

the same result as the SEC's disgorgements. A pre-Revolution English statute, for example, compelled defendants who illegally sold books to forfeit "five pounds, and double the value of every book." *Backus v. Gould*, 48 U.S. 798, 805 (1849) (quotation marks omitted). This provision, thus, required defendants to turn over the amount of their "ill-gotten gains," Pet. App. 45a, plus an additional sanction of the same amount. Early American statutes followed the same model. For instance, the customs statutes discussed above imposed a forfeiture of "double the value of the goods" wrongfully imported. *Bajakajian*, 524 U.S. at 341-42 (quotation marks omitted). Likewise, Congress provided that if a postmaster did not "render his account for one month," he would "forfeit double the value of the postages which shall have arisen at the same office in any equal portion of time." *United States v. Roberts*, 50 U.S. 501, 518 (1850). Again, that forfeiture is, in substance, disgorgement of the amount that the postmaster failed to account for, plus another sanction of the same amount.

The SEC's scheme works the same. The SEC can obtain "disgorgement" equal to "the ill-gotten gains," Pet. App. 25a, plus a fine also equal to the "amount of pecuniary gain," 15 U.S.C. §§78u(d)(3)(B), 80a-41(e)(2), 80b-9(e)(2); *see* Pet. App. 25a. That is *precisely* the same as the "double the value" forfeitures known in the early Republic. The government has merely split up its enforcement actions into two parts—calling the amount up to the ill-gotten gains "disgorgement" and anything else a "penalty."

The government contends that by slicing and dicing,

it has rendered §2462's limitations period inapplicable to the "disgorgement" piece. This Court rejected a similar argument two centuries ago in *Adams v. Woods*, 6 U.S. (2 Cranch) 336 (1805). There, too, the government contended that §2462's 1790 predecessor was inapplicable because it had proceeded via a "form of action"—for "debt"—that the statute did not expressly cover. *Id.* at 341. In the government's view, the statute applied only to criminal proceedings "carried on in the form of an indictment or information." *Id.* at 340. But Chief Justice Marshall, writing for the Court, disagreed. "[I]f the words ... be examined, they will be found to apply not to any particular mode of proceeding, but generally." *Id.* And giving the statute its full breadth was essential because otherwise, government enforcement actions could "be brought at any distance of time," which would be "utterly repugnant to the genius of our laws." *Id.* at 342. When "not even treason can be prosecuted after a lapse of three years," the Chief Justice stressed, "it could scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture." *Id.*

This case calls for the same result. "Forfeiture" readily covers "disgorgement." The Court should reject the government's position that this novel "form of action," *id.* at 341, puts disgorgement beyond any statute of limitations and renders an individual "forever liable" to the government, *id.* at 342.

C. The Tenth Circuit Made Basic Textual, Historical, And Logical Errors.

The Tenth Circuit's analysis was incorrect in multiple additional respects.

1. The Tenth Circuit's main claim—that "forfeiture" historically had "a narrow focus" referring solely to "an in rem procedure to take tangible property," Pet. App. 14a (quotation marks omitted)—is not just backwards on the history. It squarely contradicts the statutory text. The immediately preceding U.S. Code section explicitly discusses two types of "forfeiture": "pecuniary forfeiture," 28 U.S.C. §2461(a), and "forfeiture of property" *id.* §2461(b). Thus, §2462—which applies to *all* forfeitures, "pecuniary or otherwise"—cannot be limited to "in rem procedure[s] to take tangible property." Pet. App. 14a (quotation marks omitted). Indeed, in *Adams*, this Court specifically applied §2462's predecessor to an *in personam* forfeiture of money: The statute there provided that a defendant "carrying on the slave trade" "shall *forfeit* ... two thousand dollars," and this Court regarded it as intolerable that a person might "remain forever liable to a *pecuniary forfeiture*." 6 U.S. (2 Cranch) at 336, 342 (quotation marks omitted).

2. The Tenth Circuit also invoked the *noscitur a sociis* canon. It believed §2462's enumerated sanctions are all punitive, and so concluded that the section cannot cover disgorgement, which it thought was remedial. Pet. App. 10a, 15a; *see id.* 15a ("[T]he term forfeiture is linked in §2462 to the undoubtedly punitive actions for a civil fine or penalty" and the "nonpunitive remedy of disgorgement does not fit in that company").

This argument fails because its premise is false: As just explained, many "forfeitures" in the early Republic were nonpunitive. *Supra*, at 14-15. Indeed, the Tenth Circuit admitted as much: It conceded that "forfeiture"

covers *in rem* forfeitures used to take goods associated with violations of customs and revenue laws. Pet. App. 14a. But those forfeitures were *remedial* and *nonpunitive*. *Bajakajian*, 524 U.S. at 340-41 ("[s]uch forfeitures ... were not considered at the founding to be punishment"); *Austin*, 509 U.S. at 621 ("the forfeiture of contraband itself may be characterized as remedial" (quotation marks omitted)). So, the word "forfeiture" encompasses nonpunitive remedies. That means disgorgement's supposedly "nonpunitive" nature cannot remove it from §2462.

Indeed, faithfully applied, the *noscitur a sociis* canon supports Petitioner: If the task is to see how "[a]ssociated words bear on one another's meaning," Pet. App. 15a (quotation marks omitted), the words "fine" and "penalty" are far more similar to "disgorgement" (which, likewise, is an *in personam* obligation to pay money) than to an *in rem* duty to turn over tangible property (which the Tenth Circuit conceded falls under §2462).

This *noscitur a sociis* argument, though wrong, reinforces that the SEC and Tenth Circuit's position is an egregious gerrymander. In their view, the phrase "fine, penalty, or forfeiture," 28 U.S.C. §2462, includes: (1) "undoubtedly punitive" *in personam* judgments from general assets; and (2) purely remedial *in rem* forfeitures of "tangible property." Pet. App. 14a-15a (quotation marks omitted); BIO 8-9. Yet they say §2462 excludes a remedy *directly in the middle*: *in personam* disgorgement judgments from general assets that—in the government's view—serve a remedial purpose. *But see infra* Part II. There is no principled

way to draw a line that includes the first two categories but excludes the last.

3. The Tenth Circuit also hypothesized that "forfeiture" under §2462 is inherently different from "traditional disgorgement." Pet. App. 16a.

But there is no "traditional disgorgement." The word "disgorgement" does not appear in the Pomeroy or Story equity treatises. It first appeared in Black's Law Dictionary in 2000. It did not show up in the U.S. Code until 1988, and only then in recognition of the fact that the SEC had started using this term in the 1970s. 15 U.S.C. §78t-1(b)(2) (directing that "disgorgements" be "offset[]" against liability to victims of insider trading). And in unguarded moments, courts use "disgorgement" and "forfeiture" interchangeably. *See, e.g.*, *United States v. Ursery*, 518 U.S. 267, 284 (1996) ("Forfeitures ... require disgorgement of the fruits of illegal conduct"); *SEC v. Bilzerian*, 29 F.3d 689, 696 (D.C. Cir. 1994) (equating disgorgement with "forfeiture of illegal proceeds" (quotation marks omitted)). Given that SEC disgorgement claims are a historical novelty, there could not have been a historical distinction between such "disgorgement" claims and "forfeiture."

* * *

At §2462's enactment, any lawyer would have understood what the SEC today pursues as "disgorgement" to be a forfeiture. That resolves this case.

II. SEC DISGORGEMENT CLAIMS SEEK A "PENALTY."

Section 2462 also applies to SEC disgorgement claims because such claims seek a "penalty." This Court has repeatedly held that when monetary sanctions for wrongdoing fill the Treasury, rather than compensate victims, these sanctions are penalties. Indeed, the Solicitor General has previously *told* this Court that SEC disgorgement claims are penalties, and the government continues to take that position whenever doing so will boost government revenues.

A. A Sanction Is Punitive, And Hence A "Penalty," If It Serves In Part To Punish.

To hold that SEC disgorgement claims seek a "penalty," the Court need not conclude that they serve *only* to punish. Many sanctions are neither purely remedial nor purely punitive but have aspects of both. *See Austin*, 509 U.S. at 610 ("proceedings may advance punitive as well as remedial goals" (quotation marks omitted)).

This Court has held that if a sanction "serv[es] in part to punish," it is punitive. *Id.* That is, if the sanction "cannot fairly be said *solely* to serve a remedial purposes," but "also serv[es] either retributive or deterrent purposes," it "is punishment[.]" *Id.* (quotation marks omitted); *see also Bajakajian*, 524 U.S. at 331 n.6 (sanction is punitive "if it constitutes punishment even in part").

That approach makes sense: So long as a sanction is partly punitive, defendants should receive the protections for punitive sanctions. The presence of

some nonpunitive purpose should not eliminate them. And while this Court adopted this approach under the Excessive Fines Clause, *Austin*, 509 U.S. at 610; *Bajakajian*, 524 U.S. at 324, identical considerations apply here. Section 2462's 1790 predecessor was enacted almost contemporaneously with the Excessive Fines Clause, and the two provisions serve complementary purposes: the Clause protects against penalties excessive in scope, while the statute protects against penalties stale in time.

Here, SEC disgorgement claims clearly serve in part to punish.

B. SEC Disgorgement Claims Are Penalties Because They Go To The Government As A Sanction For Wrongdoing.

SEC disgorgement claims have the key features that define punitive sanctions: In purpose and effect, these claims seize funds because a defendant did wrong by violating the securities laws, without compensating victims.

The 1828 version of Webster's defined a "penalty" as "[t]he suffering in person or property which is annexed by law or judicial decision to the commission of a crime[,] offense, or trespass, as a punishment." 2 Webster's, *supra*, at 32. Disgorgement falls within that definition. The threshold finding triggering disgorgement is "the commission of a crime, offense, or trespass." *Id.* The proceeds that disgorgement targets are "ill-gotten gains" precisely because they were "acquired through wrongdoing." Pet. App. 10a (quotation marks omitted). Disgorgement is thus a

mandatory payment to the government, "annexed by ... judicial decision to the commission of [an] ... offense." Indeed, this Court has held when "Congress has chosen to tie" sanctions "directly to the commission of ... offenses" against the public laws, that indicates the sanction is punitive. *Austin*, 509 U.S. at 620. With disgorgement, Congress did precisely that.

Disgorgement also deters: Rather than compensating the government for its own loss, disgorgement deters wrongdoers by ensuring the wrongful conduct will not be profitable. Indeed, the Second Circuit has characterized deterrence as the "primary purpose of disgorgement orders." *SEC v. Fischbach Corp.*, 133 F.3d 170, 175 (2d Cir. 1997). Deterrence is a hallmark of punishment. *Bajakajian*, 524 U.S. at 329 ("Deterrence ... has traditionally been viewed as a goal of punishment, and forfeiture of the currency here does not serve the remedial purpose of compensating the Government for a loss").

Congress has understood "disgorgement" the same way: When Congress expressly authorized the Commodities Futures Trading Commission to seek disgorgement, it placed disgorgement in the statutory subsection on "civil penalties." 7 U.S.C. §13a-1(d), (d)(3). The SEC's authority to seek disgorgement in civil actions is implied, but that should not permit it to avoid §2462's statute of limitations for "penalt[ies]."

Likewise, this Court has characterized similar remedies as penalties. *In rem* civil forfeitures of the instrumentalities of crime are penalties. *Austin*, 509 U.S. at 621-22. Likewise, *in personam* criminal forfeitures of the proceeds of crime "operate as

punishment." *Libretti v. United States*, 516 U.S. 29, 39, 45 (1995). Disgorgement falls in between: it is an *in personam* civil judgment for the proceeds of illegal activity. It is just as much a "penalty," even if the SEC chooses to label it differently.

The SEC insists that disgorgement claims are nonpunitive because they "only ... depriv[e] the wrongdoer of the benefits of wrongdoing." Pet. App. 11a; *see* BIO 8-9. But the government ignores *why* disgorgement does so: It strips the defendant of money because *wrongdoing* occurred, but as explained below, its purpose is *not* to compensate victims. The only reason for a sanction *like that* is to impose negative legal consequences on a bad actor. That is classic punishment.

At minimum, these aspects of disgorgement show it is *partially* punitive—even if, as the government says, stripping wrongdoers of ill-gotten gains also has a remedial component. These punitive aspects make disgorgement a "penalty" under §2462.

C. SEC Disgorgement Claims Are Subject To §2462 Because They Are Noncompensatory.

Perhaps the most fundamental reason disgorgement falls within §2462 is that it is not *compensatory*. Payments go to the government, not victims. Such noncompensatory remedies, this Court has held, are subject to §2462.

1. Disgorgement serves no compensatory purpose. The SEC pursues, and obtains, disgorgement as the sovereign enforcer of the laws. Although the SEC has discretion to create "fair funds" to compensate victims,

it can do so only if it "also assess[es] a civil money penalty." 17 C.F.R. §201.1100. That means whenever a penalty claim would be outside the five-year limitations period—when the question presented here matters—the SEC *cannot* compensate victims. In all cases, moreover, the SEC has discretion not to compensate victims when it deems compensation infeasible. *See id.* §201.1102(b). And in SEC enforcement actions under statutes where victims are not readily ascertainable, such as the Foreign Corrupt Practices Act, disgorgements simply go to the Treasury.

Accordingly, the SEC and courts have been emphatic that disgorgement is not compensatory. The SEC, for example, has explained that the "purpose of disgorgement ... is ... *not* satisfying creditors or repaying investors," but to "depriv[e] wrongdoers of their ill-gotten gains." Br. of SEC at 24, *SEC v. Custable*, 796 F.3d 653 (7th Cir. 2015) (No. 15-1442), 2015 WL 3383280 (emphasis in original; brackets and quotation marks omitted). "Compensation to injured investors is a distinctly secondary goal." Br. of SEC at 4, *Martin v. SEC*, 734 F.3d 169 (2d Cir. 2013) (No. 11-3011), 2012 WL 8126225 (quotation marks and citations omitted). In fact, "loss sustained by the victims ... is irrelevant to the calculation of disgorgement in an SEC enforcement action." Br. of SEC at 32, *SEC v. Smith*, 646 F. App'x 42 (2d Cir. 2016) (No. 15-1314), 2015 WL 7185051 (quotation marks omitted). Courts have said the same thing: The "primary purpose of disgorgement is not to compensate investors," *SEC v. Commonwealth Chem. Sec., Inc.*, 574 F.2d 90, 102 (2d Cir. 1978), and hence the government need not "make

any particular effort to compensate the victims"; instead, compensation is a "matter of grace." *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 373 (2d Cir. 2011).

Indeed, Congress has recognized disgorgement as a noncompensatory sanction. Under 15 U.S.C. §78u-6(b)(1), whistleblowers in certain cases receive 10% to 30% of any "monetary sanctions," defined to include "penalties, disgorgement, and interest." *Id.* §78u-6(a)(4)(A). This provision shows three things. First, it underscores that disgorgement is not compensatory, but goes to whistleblowers and the government. Second, it treats "penalties" and "disgorgement" interchangeably. Third, the catchall word Congress used—"sanction"—means a "penalty or coercive measure that results from failure to comply with a law, rule or order." *Black's Law Dictionary* 1541 (10th ed. 2014).

2. The fact that disgorgement is noncompensatory is dispositive: That feature defines the line between what is a "penalty" and what is not.

This Court so held in *Kelly v. Robinson*, 479 U.S. 36 (1986). *Kelly* concerned a virtually indistinguishable statute—a Bankruptcy Code provision that renders nondischargeable any debt for "a fine, penalty, or forfeiture," 11 U.S.C. §523(a)(7)—and asked whether criminal restitution is a "penalty." The Court said yes, even though restitution ultimately reaches victims. 479 U.S. at 52. The Court deemed restitution a penalty because "[t]he victim has no control" over the action, and the "focus" was not on "the victim's desire for compensation"; rather, the "decision ...turn[s] on ... the

... goals of the State." *Id.* at 52-53. *Kelly* resolves this case. All these features of restitution also hold true of disgorgement; indeed, disgorgement looks even *less* like compensation than restitution, given that the government has the discretion to, and often does, keep the money.

Kelly is only the most recent in a long line of cases establishing that similar noncompensatory remedies are "penalties." The Court reached the same result in *Brady v. Daly*, 175 U.S. 148 (1899). *Brady* concerned whether a copyright owner's suit seeking statutory damages for infringement was an action "to recover a penalty." *Id.* at 152. The Court held that these damages were nonpunitive precisely because they concerned "entirely damages suffered by the wrongful act"; the "whole recovery is given to the" copyright owner; and "the statute does not provide for a recovery by any other person in case the [owner] neglects to sue." *Id.* at 154-55. *Brady* distinguished the copyright owner's suit from a "*qui tam* action," explaining that because *qui tam* actions provided for payments to someone other than "the party grieved," they were punitive. *Id.* at 155 (quotation marks omitted). So, for example, if a statute gave "the right to recover back money lost at gaming" and "if the loser does not sue within a certain time, authorizing a qui tam action to be brought by any other person," then the action would be "remedial as to the loser" but "penal as regards the suit by a common informer." *Id.* (quoting *Huntington v. Attrill*, 146 U.S. 657, 668 (1892)).

This Court has held that *Brady* governs limitations questions. In *Chattanooga Foundry & Pipe Works v.*

City of Atlanta, 203 U.S. 390 (1906), this Court addressed a limitations issue under §2462's predecessor.[6] It held that the "construction of the phrase 'suit for a penalty,' and the reasons for that construction, have been stated so fully by this court that it is not necessary to repeat them," citing *Brady* and *Huntington*. *Id.* at 397. This Court did the same thing in *Meeker v. Lehigh Valley Railroad Co.*, 236 U.S. 412 (1915), which concerned whether §2462's predecessor applied to a private damages claim. The Court juxtaposed the "strictly remedial" damages action there, which imposed "liability ... solely for the purpose of redressing a private injury," from "something imposed in a punitive way *for an infraction of a public law*." *Id.* at 423 (emphasis added).[7]

Hence, the questions that were controlling in *Brady*—whether the "whole recovery is given to the" victim, or whether the statute "provide[s] for a recovery by an[] other person," 175 U.S. at 154—are dispositive under §2462. And under *Brady*, this case is easy. When the SEC pursues disgorgement, the "whole recovery" goes to the Treasury, not victims. Indeed, SEC disgorgement actions are just a twist on the qui tam actions discussed in *Brady*: Claims for securities-law that might have been "remedial" if

---

[6] The law at issue was Rev. Stat. §1047 (1901), which applied a five-year limitations period to any "suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States." *Chattanooga*, 203 U.S. at 397.

[7] Early lower court decisions drew the same line. *See Raymond v. United States*, 20 F. Cas. 337, 337-38 (C.C.S.D.N.Y. 1876); *Stearns v. Lawrence*, 83 F. 738, 741 (6th Cir. 1897).

brought by victims are "penal as regards" the SEC, which sues to enforce the laws against wrongdoers, and may keep any recovery. 175 U.S. at 154-55 (quotation marks omitted).

This Court followed *Brady*'s line again in *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946). The government's certiorari-stage brief cited *Porter* for the proposition that "disgorgement 'differs greatly from ... damages and penalties.'" BIO 8 (quoting *Porter*, 328 U.S. at 402). But the "disgorgement" remedy in *Porter* was *compensatory*: *Porter* held that under the Emergency Price Control Act of 1942, the Administrator could bring a "restitution" claim that would require landlords to disgorge unlawful rents to the tenants *who paid them*, "restoring the status quo [by] ordering the return of that which rightfully belongs to the purchaser or tenant." *Porter*, 328 U.S. at 401-02. *Porter* distinguished this compensatory remedy from a *different* remedy, likewise pegged to "the amount of the overcharge," that the Administrator could also pursue: "damages in the nature of penalties" that would "go to the United States Treasury." *Id.* at 401-02; *id.* at 406 (Rutledge, J., dissenting). This remedy was a penalty precisely because it went to the Treasury. Notably, this "penalty" encompasses exactly what the SEC obtains via "disgorgement": An order to pay to the government an amount tied to the defendant's ill-gotten gains, but which does not compensate victims. *Porter* properly characterized this sanction as a penalty, and this Court should do the same.

Indeed, *Porter* is a perfect example of how courts

have historically vindicated the SEC's "disgorgement" goal through remedies styled "penalties" or "forfeitures." The "penalty" in *Porter* could be up to "three times the amount of the overcharge." 328 U.S. at 406 & n.9 (Rutledge, J., dissenting). In modern parlance, it required disgorgement of the overcharge, plus an additional penalty. Yet the whole remedy, including the disgorgement, was a "penalty." The government cannot avoid statutory limitations on such remedies by dividing them into a "disgorgement" piece and a "penalty" piece.

D. Section 2462 Carries Forward a Centuries-Old Legal Tradition of Guarding Against the Special Dangers of Government Enforcement Suits.

History also demonstrates *why* §2462 draws a bright line between compensatory payments to victims, and noncompensatory payments to the government. The government strains to depict disgorgement as merely restoring the status quo. But for one litigant, it plainly does *not*: The government suffered no injury, yet deposits disgorgement payments into the Treasury. And for 800 years, English and American law have recognized that the dangers of abuse are especially acute—and the need for safeguards like limitations periods especially great—when enforcement suits fill the government's coffers. Section 2462 carries forward this ancient tradition by applying its limitations period to all such suits.

The Court applied this principle in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), where it held that "the Excessive Fines

Clause was intended to limit only those fines directly imposed by, and payable to, the government." *Id.* at 268. The Court explained that the Clause "limit[s] the ability of the sovereign to use its prosecutorial power ... for improper ends." *Id.* at 267. The Court traced such limitations on prosecutorial power back to 13th-century England, where the King's "abusive" use of royal penalties known as "amercements" resulted in "'tyrannical extortions ... with which John ... oppressed his people.'" *Id.* at 270, 272 (citation omitted). In response, the "barons who forced John to agree to Magna Carta sought to ... limit the King's use of amercements as a source of royal revenue." *Id.* at 270-71. Magna Carta did so by pegging penalties to *harm*—"requiring that one be amerced only for some genuine harm to the Crown," and that the "amount ... be proportioned to" that harm. *Id.* at 271. Thus, the Excessive Fines Clause embodies a legal tradition carving out *noncompensatory* payments to the government as uniquely deserving of protection.

English law extended the protections from revenue-raising government suits to statutes of limitations. An Elizabethan statute provided a one- or two-year limitations period for any action "upon any penal statute ... where the forfeiture is originally given only to the king," or to "in part to the king and in part to [a qui tam] prosecutor." 4 William Blackstone, *Commentaries* *304. Notably, this Elizabethan statute did not apply when the recovery went to the injured party—as early American courts noted in drawing the same line as *Brady*. *See, e.g.*, *Mansfield v. Ward*, 16 Me. 433, 437-38 (1840) (noting that the "statute of Eliz.

does not extend to an action brought by the party aggrieved," but "a statute is to be considered penal, when the party recovering is not obliged to make any ... proof of injury"); *see also Goodridge v. Rogers*, 39 Mass. 495, 498 (1839). The statute's protections were necessary precisely because of the special dangers of enforcement suits that raised revenue for the Crown.

Section 2462, whose predecessor was enacted contemporaneously with the Excessive Fines Clause, protects against these same dangers by distinguishing between compensatory claims on the one hand, and noncompensatory enforcement claims on the other. At the time of §2462's enactment, "fines," "penalties," and "forfeitures" covered the full gamut of judgments payable to the government in its capacity as sovereign enforcer. *Cf. In re Landsberg*, 14 F. Cas. 1065, 1067 (E.D. Mich. 1870) ("Every offence against the customs laws ... belongs to some one of the following classes: (1) Crimes, punishable ... by fine and imprisonment. (2) Forfeitures.... (3) Pecuniary penalties, recoverable by action, all of which are clearly within the provisions of the one or the other of the [statutes of limitations] above named." (citation omitted)). And in Petitioner's view, §2462 continues to provide this broad protection, applying to all money sanctions that the government obtains as enforcer of the laws. Meanwhile, when the government brings contract or tort claims to redress its own injuries, separate statutes enacted in the 1960s provide a limitations period. *See* 28 U.S.C. §2415.

By contrast, the SEC contends that its newly-invented type of monetary sanction—disgorgement—falls outside §2462, or any statute of limitations. The

government thus asserts there are *three* types of backwards-looking money judgments payable to the government: purely punitive fines (covered by §2462), purely remedial compensatory awards (covered by other limitations periods), and "disgorgement" (which lies somewhere in between and can be pursued forever). This taxonomy has no historical pedigree: The SEC created it to further modern litigation goals, and it would badly undermine the ancient tradition that §2462 embodies. The Court should reject it.

E. The Specific Features Of SEC Disgorgement Claims Reinforce That They Are Penalties.

The SEC's claim that disgorgement restores the status quo ante also ignores how disgorgement works in practice. In the real world, disgorgement sweeps beyond what any nonpunitive remedy would reach.

The SEC has argued, and courts have agreed, that wrongdoers must disgorge proceeds that went to other people. That happened in this case, *supra* at 7, and in many others. For instance, "an insider trader may be ordered to disgorge not only the unlawful gains that accrue to the wrongdoer directly, but also the benefit that accrues to third parties whose gains can be attributed to the wrongdoer's conduct." *SEC v. Contorinis*, 743 F.3d 296, 302 (2d Cir. 2014). Thus, a tipper must disgorge proceeds that goes to a tippee, *id.* at 302-03, and an employee must disgorge proceeds that go to his employer. *Id.* at 300, 307 (affirming employee's disgorgement of $7.2 million despite "personal profit" of only $427,875). Even if the defendant himself "ultimately ... lost" money, still disgorgement may be ordered. *SEC v. First Pac.*

Bancorp, 142 F.3d 1186, 1192 & n.6 (9th Cir. 1998).

Such disgorgements go well beyond traditional remedial replevy orders requiring the defendant to return something he misappropriated. They require defendants to pay disgorgement awards, exceeding any amount they ever obtained, from their own untainted assets—as occurred here. Pet. App. 12a-13a. The Tenth Circuit acknowledged this point, but stressed that "we do not consider it punitive to require a personal-injury tortfeasor to pay for all damages caused by his tort ... even if he gained nothing." Pet. App. 13a. But tort awards are nonpunitive because they are compensatory. SEC disgorgement claims are not.

Similarly, as the District Court explained below, defendants may not "deduct ... expenses from the net proceeds to reduce their liability for ill-gotten gains." Pet. App. 43a (quotation marks omitted). The justification for this rule is that deductions would be "unjust," and disgorgement is designed not only to "prevent the wrongdoer's unjust enrichment," but also "to deter others' violations of the securities laws." *Id.* Barring the deduction of expenses ensures that the defendant will *not* be restored to the status quo ante. It may indeed promote justice and advance deterrence, but those are the classic goals of punishment.

Finally, disgorgement is not subject to causation principles that courts apply to compensatory damages. Courts require disgorgement when the actual "cause of all the[] profits" was not any securities-law violation, but rather an "intervening cause" that was linked to the violation only by "dumb luck." *SEC v. Teo*, 746

F.3d 90, 107–09 (3d Cir. 2014). This principle is not motivated by any compensatory rationale, but instead by maximizing the sanction's "deterrent impact." *Id.*

If further proof were needed that SEC disgorgement claims are penalties, these features provide it. To decide whether disgorgement is a penalty, the Court must understand what disgorgement *is*. The SEC has persuaded lower courts that disgorgement requires payments of proceeds that went to *any* party, without deduction for expenses—and has thus made disgorgement a powerful remedy indeed. The SEC cannot dodge the consequences of its success: Disgorgement is a penalty subject to §2462's limitations period.

F. The Government Has Previously, And Correctly, Argued That SEC Disgorgement Claims Are Punitive.

In other contexts, the government has insisted disgorgement claims are penalties. To avoid §2462's time bar, it has switched positions here. It was right before.

Bankruptcy orders. Consistent with *Kelly*, the SEC has successfully argued that disgorgement is not dischargeable in bankruptcy because it is a "fine, penalty, or forfeiture" under §523(a)(7) of the Code. *In re Telsey*, 144 B.R. 563, 565 (Bankr. S.D. Fla. 1992). The government persuaded the Fourth Circuit to adopt that view in *U.S. HUD v. Cost Control Marketing & Sales Management of Virginia, Inc.*, 64 F.3d 920 (4th Cir. 1995), which held that a disgorgement judgment was a penalty because it "order[ed] payment to HUD

and impose[d] no obligation on HUD to disburse the money to anyone." *Id.* at 927-28. And when the debtor sought certiorari, the Solicitor General told this Court that the disgorgement judgment was "sufficiently penal to be considered a 'fine, penalty, or forfeiture.'" BIO at 11, *Cost Control Mkt. & Sales Mgmt. of Va., Inc. v. Cisneros*, 517 U.S. 1187 (1996) (No. 95-1233), 1996 WL 33467992. Indeed, as to the "forfeiture" prong, the Solicitor General said it was "unquestionably a 'forfeiture' in the common usage of that term, since the amount disgorged represents ... profits ... petitioners have been required to forfeit as a result of their breach of their legal obligations." *Id.* at 11 n.4.

Tax deductions. The government takes the same position today. The Internal Revenue Code prohibits deductions for "any fine or similar penalty paid to a government for the violation of any law." 26 U.S.C. §162(f). In 2016, the IRS concluded that SEC disgorgement orders are nondeductible where, as here, they "serve[] primarily to prevent wrongdoers from profiting from their illegal conduct and deter[] subsequent illegal conduct." Office of Chief Counsel, IRS, Memorandum, Section 162(f) and Disgorgement to the SEC, No. 201619008, at 9 (Jan. 29, 2016). It was "determinative," the IRS elaborated, that there was "nothing indicating that the purpose of the disgorgement payment was to compensate the United States Government or some non-governmental party for its specific losses." *Id.* at 10.

Criminal forfeitures of "proceeds." As explained above, several criminal forfeiture statutes require forfeiture of the proceeds of illegality, in a remedy

functionally identical to disgorgement. *E.g.*, 21 U.S.C. §853(a)(1); *see supra* at 16. And this Term, the government is emphasizing the point in another case. Per the Solicitor General, an "in personam criminal forfeiture" is "clearly a form of monetary punishment" analogous to a "traditional 'fine'" because it (1) "requires forfeiture of the gross receipts from criminal activity, not just its net profits"; (2) "extends to proceeds that the defendant merely held before transferring to others"; and (3) "permits the imposition of a personal money judgment, not just the forfeiture of specific tainted assets." BIO at 17, *Honeycutt v. United States*, 137 S. Ct. 588 (2016) (No. 16-142), 2016 WL 6519854. All those facts are true for disgorgement. It reaches all wrongfully obtained funds without offset; it extends to funds that go to third parties; and it is a personal money judgment that does not require tracing to tainted assets. *Supra* at 35-37. Hence, the judgment is "punishment," and a "forfeiture," under the Solicitor General's own understanding of those terms.

The government's position is especially indefensible because it treats *the same* payments differently. If Petitioner seeks discharge in bankruptcy, or tax deductions, the government will call its disgorgement claim a "penalty." Yet per the government, this same claim changes, chameleon-like, when necessary to hide from §2462's limitations bar. That cannot be so. At bottom, the government is consistent only in its desire to extract *more money*.

III. THE GOVERNMENT'S POSITION IS INCONSISTENT WITH THE PURPOSES OF LIMITATIONS PERIODS GENERALLY, AND §2462 SPECIFICALLY.

A. Allowing Government Enforcement Actions To Stretch Back Forever Violates The Core Purpose Of Limitations Periods.

Limitations periods are critical to the fair enforcement of the laws. In *Gabelli*, this Court explained that §2462 "sets a fixed date when exposure to ... Government enforcement efforts ends." 133 S. Ct. at 1221. In so doing, it "advanc[es] the basic policies of all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Id.* (quotation marks omitted). Such statutes are necessary to "promote justice" and "prevent[] surprises." *Id.* (quotation marks omitted). Otherwise, the government could "reviv[e] claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Id.* (quotation marks omitted). Hence, this Court has concluded that limitations periods are "vital to the welfare of society," reflecting the judgment that "even wrongdoers are entitled to assume that their sins may be forgotten." *Id.* (quotation marks omitted).

The government's position here violates those foundational commitments. Per the government, SEC disgorgement claims are "not subject to any statute of limitations." BIO 9 (quotation marks omitted). No matter how great the "surprise[]," or that the

government has waited "until evidence has been lost, memories have faded, and witnesses have disappeared," *Gabelli*, 133 S. Ct. at 1221 (quotation marks omitted), the government claims it can pursue actions as far back as it chooses to look, so long as it captions its claim "disgorgement."

In fact, the dangers here are more acute than in *Gabelli*. *Gabelli* relied on these limitations principles to reject the government's request to apply a "discovery rule" to fraud claims under §2462. The Court stressed that "grafting the discovery rule onto §2462 would ... leave defendants exposed to Government enforcement action not only for five years ..., but for an additional uncertain period." *Id.* at 1223. At least in *Gabelli*, however, the government could extend the limitations period only by showing it could not "reasonably ... have known" about the fraud. *Id.* Here, the government can sue forever simply by showing the defendant has "wrongfully obtained" money, BIO 9 (quotation marks omitted). That will be true in virtually every case. Indeed, given that the SEC "seeks disgorgement in the majority of its enforcement actions," *id.* at 10-11, its position here is just a thinly veiled attempt to avoid *any* time limit. It contends that no statute of limitations applies, and that no laches defense applies either. *See, e.g.*, Br. of SEC, *SEC v. Silverman*, 328 F. App'x 601 (11th Cir. 2009) (No. 08-16710-FF), 2009 WL 1674430.

This result is especially troubling because of how the SEC enforces the law. Important rules go decades without amendment; Rule 10b-5, for example, remains identical to what the SEC promulgated in 1942. *See*

Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 729 (1975). Instead, the SEC expands the securities laws by seeking novel judicial glosses on old rules, which it applies retroactively. In *Gabelli*, as Justice Kagan pointed out at argument, the delay between violation and enforcement arose because of changed "enforcement priorities"—the "government had decided not to go after market timers," but when Eliot Spitzer started to do so the SEC became "embarrassed," and "made a different enforcement priority decision." Tr. of Oral Argument, *Gabelli v. SEC*, at 38:1-22. Likewise, private equity fund advisers did not register with the Commission until required to do so by the 2010 Dodd-Frank Act. Andrew Ceresney, Director of Enforcement, *Securities Enforcement Forum West 2016 Keynote Address: Private Equity Enforcement* (May 21, 2016), http://bit.ly/2kuNQBD. Yet after the SEC "began its focus on private equity," it did not promulgate *new* rules; rather, it asserted that the advisers "have always been ... subject to" the Investment Advisers Act. *Id.* And it sought "disgorgement" based on alleged violations that predated this "focus" and were outside §2462's limitations period—rejecting defendants' arguments that it was "unfair to charge [them] for ... failures in ... documents that were drafted long before the SEC began its focus." *Id.*[8]

---

[8] *See* Blackstreet Capital Mgmt. LLC, Investment Advisers Act of 1940, Release No. 4411 (June 1, 2016) (disgorgement claims dating to 2005); Kohlberg Kravis Roberts & Co. LP, Investment Advisers Act of 1940, Release No. 4131 (June 29, 2015) (disgorgement claims dating to 2006).

Nor is the danger limited to the SEC. Section 2462 "governs many penalty provisions throughout the U.S. Code." *Gabelli*, 133 S. Ct. at 1219. For instance, it applies to enforcement actions under the Clean Air Act, *United States v. EME Homer City Generation, L.P.*, 727 F.3d 274, 282 n.9, 296 (3d Cir. 2013); Clean Water Act, *United States v. Telluride Co.*, 146 F.3d 1241, 1243 (10th Cir. 1998); and Federal Power Act, *FERC v. Barclays Bank PLC*, 105 F. Supp. 3d 1121, 1130-31 (E.D. Cal. 2015). And the government pursues disgorgement actions across a wide range of statutes. *See, e.g.*, 105 F. Supp. 3d at 1127 (Federal Power Act). Endorsing the government's position here would confer fearsome power upon agencies across the federal government.

This result would put disgorgement claims in unfamiliar company. Virtually all federal crimes have statutes of limitations—including crimes such as arson, slave trafficking, biological weapons offenses, murder of foreign officials, and terrorist attacks on trains and mass transit. *See* Charles Doyle, Cong. Research Serv., RL31253, *Statutes of Limitation in Federal Criminal Cases: An Overview*, at 25-27 (2012), http://bit.ly/2jBRfPo. Only for a handful of the most serious crimes has Congress provided that *no* limitations period applies—certain murder offenses, treason, certain acts of terrorism, and certain child abduction and sex crimes. *Id.* at 18-21. Disgorgement claims do not belong in this company.

B. The Government's Position Results In A Bizarre And Indefensible Line.

Here is the result the government's position yields:

A purely *punitive* judgment payable to the government—*i.e.*, a "fine"—has a statute of limitations. 28 U.S.C. §2462. The same is true of a purely *remedial* judgment payable to injured parties—say, a compensatory damages award to investors. *Merck & Co. v. Reynolds*, 559 U.S. 633, 637 (2010). But *no* limitations period applies to one that, in the government's view, is right in between: A judgment that is (says the government) remedial, but payable to the government. BIO 8. Why would that be? That bizarre line tests the boundaries of the Fourteenth Amendment's rational-basis test.

In particular, this line makes nonsense of the purposes of limitations periods. Whether the government seeks a "penalty" or "disgorgement," the cause of action is the same (securities-law violations), the type of remedy is the same (backwards-looking money sanctions), and in many cases, the amount is the same, too: Here, for example, Petitioner's penalty was based on the "gross amount of pecuniary gain," just like the disgorgement judgment. Pet. App. 28a (quoting 15 U.S.C. §§78u(d)(3)(B), 80b-9(e)(2), 80a-41(e)(2)); *see id.* at 33a. And with the claims so indistinguishable, so too are the purposes served by the statute of limitations: the need for "repose," and avoiding delays until "evidence has been lost, memories have faded, and witnesses have disappeared." *Gabelli*, 133 S. Ct. at 1221 (quotation marks omitted). Certainly, the government does not need *more* time to prepare its disgorgement claims than its penalty claims.

All this is also true of private damages actions. If anything, such actions would be a *stronger* case for

waiving the limitations period: Damages actions compensate victims, and victims sometimes struggle to discover claims and develop evidence. *Cf. Gabelli*, 133 S. Ct. at 1221. Yet still a five-year limit applies. 28 U.S.C. §1658(b)(2); *see Merck*, 559 U.S. at 650. By contrast, the SEC has every ability to bring claims in a timely fashion. Its "central mission" is to "investigat[e] potential violations of the federal securities laws," and it has "many legal tools at hand" to further this mission. *Gabelli*, 133 S. Ct. at 1222 (quotation marks omitted). In light of the special interest in repose associated with government enforcement actions, it is incongruous to suggest that *only* such actions can be brought with no time limitation.

The government will emphasize its interest in stripping wrongdoers of profits. BIO 10-11. But by their nature, statutes of limitations preclude claims that, absent the time bar, would further the law's purposes. For example, the government assuredly has an interest in imposing civil penalties on securities-law violators, and in prosecuting arsonists, slave traffickers, and the architects of biological weapons. *Supra* at 43. Likewise, investors surely have an interest in compensation for injury. Yet limitation periods apply. That is because, as time passes, another interest comes to the fore—in "provid[ing] security and stability to human affairs," which this court has called "vital to the welfare of society." *Gabelli*, 133 S. Ct. at 1221 (quotation marks omitted). Eliminating the limitations period for SEC disgorgement actions *alone* advances no sensible purpose.

Adams rejected a similar argument. As explained,

the government there argued it could evade the limitations period by seeking a $2,000 sanction in a civil "debt" action, rather than a criminal prosecution. 6 U.S. (2 Cranch) at 336. This Court rejected that argument because "to declare that the information was barred while the action of debt was left without limitation, would be to attribute a capriciousness ... which could not be accounted for." *Id.* at 341. "It would be singular," the Court continued, "if the one remedy should be barred and the other left unrestrained." *Id.* Two hundred years later, and the government's position is just as capricious.

C. The Applicable Presumption Counsels In Favor Of, Not Against, Applying §2462's Limitations Period.

The Tenth Circuit incorrectly believed that §2462 should be "interpreted narrowly in the government's favor" based on a "public policy [of] not imposing ... statutes of limitations on the government." Pet. App. 6a.

The Tenth Circuit misunderstood the presumption. This presumption works in the government's favor when it sues to vindicate *its own* rights to money and property. *See BP Am. Prod. Co. v. Burton*, 549 U.S. 84 (2006) (royalties); *Badaracco v. Comm'r*, 464 U.S. 386 (1984) (taxes); *E.I. DuPont de Nemours & Co. v. Davis*, 264 U.S. 456 (1924) (government property). In this context, the presumption furthers the "great public policy of preserving the public rights, revenues, and property from injury and loss by the negligence of public officers." *Guar. Trust Co. of N.Y. v. United States*, 304 U.S. 126, 132 (1938). Early courts, for

example, feared that limitations periods might cause it to lose public lands by adverse possession. *Lindsey v. Lessee of Miller*, 31 U.S. (6 Pet.) 666, 673 (1832).

This case, however, concerns an enforcement action yielding government revenues without government injury. In *this* context, the presumption is the opposite. That is evident from *Adams*, where the Court refused to limit the 1790 statute to criminal actions, despite a plausible textual argument for doing so. 6 U.S. (2 Cranch) at 341.[9]

It is even more clear from *United States v. Mayo*, 26 F. Cas. 1230 (C.C.D. Mass. 1813), in which Justice Story, riding circuit, found a presumption *in favor* of limitations period for enforcement suits yielding sanctions to the government. In that case, Justice Story considered the proper limitations period for a customs violation—in particular, whether to apply a 1799 statute of limitations. Justice Story found that the "natural and ordinary import" of the "language employed" in the 1799 statute suggested it would not apply. *Id.* at 1231. But if that would result in "no act limiting the time," Justice Story would have found "considerable force in the argument" that the 1799 act nonetheless should apply, precisely for the "reason stated by the court in *Adams*"—that it would be "utterly repugnant to the genius of our laws, to allow"

---

[9] The 1790 Act provided that after three years, "no person ... shall ... be prosecuted, tried or punished for any offense..., nor for any fine or forfeiture under any penal statute." The first part plainly concerns criminal proceedings, and it would have required no great leap to conclude the second was similarly limited.

government enforcement actions "a perpetuity of existence." *Id.* Thus, Justice Story applied a presumption *in favor of* a statute of limitations, which trumped the "natural and ordinary import" of the statutory text. Justice Story ultimately declined to apply the 1799 act because he found that the 1790 statute at issue in *Adams* applied instead—which was even *shorter*. *Id.*

The same point is plain from *Gabelli*. It was common ground that the "discovery rule" sought by the government applied to "a defrauded victim seeking recompense." 133 S. Ct. at 1221. If a presumption worked in the government's favor, it would dictate treating the government no less favorably than private plaintiffs. But this Court held the opposite, explaining that where "the Government bring[s] an enforcement action," rigorous adherence to the statute of limitations was *more* necessary than in private suits. *Id.* at 1221, 1223.

Indeed, applying a pro-government clear-statement rule would be bizarre. SEC disgorgement claims are an implied remedy courts created in the 1970s. *Supra* at 3. Section 2462 was last amended in 1948. So *of course* §2462 does not utter the word "disgorgement." The Tenth Circuit's presumption would eliminate a limitations period from virtually any implied claim—because when Congress did not provide an express cause of action, it is unlikely to have enacted an express limitations period. That makes little sense. *Cf. UPS, Inc. v. Mitchell*, 451 U.S. 56, 68 n.4 (1981) (Stewart, J., concurring in judgment) ("[T]he fact that Congress did not provide a limitations period for a judicially

enforceable action later found implied in [a statute] is not comparable to a congressional failure to establish a time limitation for an action it expressly creates by statute.").

IV. THE CHARACTERIZATION OF DISGORGEMENT AS "EQUITABLE" IS BOTH IRRELEVANT AND WRONG.

At the certiorari stage, the government suggested that SEC disgorgement claims cannot fall within §2462 because such claims are "equitable"—in the sense that, before the merger of law and equity, "chancery courts possessed the power to order" the relief that such claims seek. BIO 8 (quotation marks omitted); *see Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210 (2002) (defining "equitable relief" as "categories of relief that were typically available in equity" (quotation marks omitted)).

This argument fails. Section 2462 contains no exception for "equitable" remedies. Even if it did, SEC disgorgement claims would not fall within this exception.[10]

A. Section 2462 Applies To Equitable Remedies.

The government's certiorari-stage brief intimates that there is some background principle holding that

---

[10] The government occasionally conflates "equitable" with "remedial." BIO 8. "Remedial" often refers to remedies that are not punitive, *see, e.g.*, *Ursery*, 518 U.S. at 277, while "equitable" refers to relief typically available from chancery. *Knudson*, 534 U.S. at 210. These are different things: Suits for compensatory damages are remedial, but they are actions at law. *See id.*

equitable remedies are exempt from statutes of limitations. BIO 8. There is not. It is true that when Congress creates "an equitable right," but "leaves to the federal courts the formulation of remedial details" like limitations periods, federal courts follow "historic principles of equity" under which "statutes of limitation are not controlling measures of ... relief." *Holmberg v. Armbrecht*, 327 U.S. 392, 395-96 (1946). But that principle applies when Congress is silent as to the "remedial details": if "Congress explicitly puts a limit upon the time for enforc[ement], there is an end of the matter." *Id.* at 395.

The legislature regularly limits equitable claims. Even before the merger of law and equity, statutes of limitations often covered equitable claims. As Pomeroy explains, although "[i]n the early forms of the statute of limitations, the provisions were, in express terms, confined to actions at law," "modern forms of these statutes, in the American states, generally declare, in express terms, that the periods of limitations shall apply to all equitable suits as well as to legal actions." 1 John N. Pomeroy, *Pomeroy's Equity Jurisprudence* §419 (3d ed. 1905). Likewise, this Court has recognized as "well settled" that "a statute of limitations may be set up in defence in equity, as well as at law." *Lewis v. Marshall*, 30 U.S. (5 Pet.) 470, 477 (1831). And today, almost all statutes of limitations are tied to the underlying cause of action, and thus apply to all remedies, legal or equitable. *See, e.g., Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1967 (2014) (noting that the three-year statute of limitations for copyright claims applies to "relief of any kind,"

whether legal or equitable).

In §2462 as well, Congress limited both legal and equitable claims. Section 2462 covers, without exception, "any civil fine, penalty, or forfeiture." There is no exclusion for "equitable" remedies. Indeed, the absence of such exclusion is particularly telling because Congress routinely *does* distinguish equitable claims from others. *See, e.g.*, 29 U.S.C. §1132(a) (ERISA); 42 U.S.C. §2000e-5(g) (Title VII). This Court should not introduce that distinction into a statute that nowhere mentions it. This Court does not "read ... unmentioned, open-ended, 'equitable' exceptions into [a] statute" of limitations. *United States v. Brockamp*, 519 U.S. 347, 352 (1997). Inserting such an exception is especially unattractive here, because for modern lawyers, discerning what relief was available at chancery can be *hard*. As to ERISA, for example, this Court routinely has to resolve circuit splits over what is "equitable" relief. *See, e.g., Montanile v. Bd. of Trustees of Nat'l Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651 (2016); *US Airways, Inc. v. McCutchen*, 133 S. Ct. 1537 (2013). The Court should not embark on that project here by creating an atextual exception to §2462 based on a supposed background principle that, in reality, does not exist.

Indeed, the government's position is even more untenable because at least *some* equitable remedies plainly qualify as "forfeitures" and "penalties." For instance, in equity courts, the government has for centuries brought actions to restrain public nuisances. 4 Pomeroy §1349. In *Bennis v. Michigan*, 516 U.S. 442 (1996), this Court upheld Michigan's equitable action to

abate a public nuisance—a car used for prostitution—via "forfeit[ure]" of the car. *Id.* at 443. The Michigan courts deemed it "critical" that the proceeding was an "equitable action," and the Court relied on that characterization in upholding the forfeiture. *Id.* at 446, 452; *see also id.* at 457 (Ginsburg, J., concurring) (explaining the "critical" importance of the equitable nature of the action). Thus, the word "forfeiture" encompasses both legal and equitable remedies.

Likewise, Congress has denominated certain equitable remedies as "penalties": When it authorized the CFTC to seek restitution and disgorgement, it called these remedies "[e]quitable remedies," while addressing them in the statutory subsection on "[c]ivil penalties." 7 U.S.C. §13a-1(d), (d)(3). Moreover, consistent with §2462's coverage of remedies that are not "pecuniary," lower courts have held that some injunctions are penalties. That is so when an injunction is imposed as "punishment for past dereliction," rather than to prevent "present danger to the public." *Johnson*, 87 F.3d at 490; *accord SEC v. Bartek*, 484 F. App'x 949, 956 (5th Cir. 2012). So while injunctions are quintessentially equitable relief, *see Mertens v. Hewitt Associates*, 508 U.S. 248, 256 (1993), they also can be penalties.

Thus, §2462 cannot contain a categorical exception for equitable remedies. The Court should follow the text and apply §2462 to all "forfeitures" and "penalties," whether legal or equitable.

B. Traditional Equitable Principles Would Have Required Application Of The Statute Of Limitations.

The SEC also gets history wrong. In the SEC's view, by labeling its disgorgement claim as "equitable," it can bring claims for "disgorgement" based on conduct going back forever. Early American courts would have rejected this maneuver. They did not allow plaintiffs to bring stale claims merely by styling them "equitable."

The bedrock principle was that "[e]quity aids the vigilant." 1 Pomeroy §418. This maxim "operate[d] throughout the entire remedial portion of equity jurisprudence." *Id.* It was a "special form of the yet more general principle, He who seeks equity must do equity." *Id.*

American courts implemented this principle in multiple ways. Under the "concurrent remedies" doctrine, American courts held that "[t]he Statutes of Limitations, when they are addressed to Courts of Equity, as well as to Courts of Law, as they seem to be in all cases of concurrent jurisdiction at law and in Equity ... seem equally obligatory in each Court. ... [I]n such cases, Courts of Equity do not act so much in analogy to the statutes, as in obedience to them." 2 Joseph Story, *Commentaries on Equity Jurisprudence* §1520 (1846); *accord Union Bank of La. v. Stafford*, 53 U.S. 327, 340-41 (1851).

Even when jurisdiction was *not* concurrent, such as in mortgage cases, equity courts *still* followed the statute of limitations. They did so by "act[ing] upon the analogy of the limitations at Law." 2 Story §1520. This

Court confirmed that even when "[c]ourts of equity are not within the statute of limitations" because "the words apply to particular legal remedies," they remain within the spirit and meaning of the statutes, and have been always so considered." *Elmendorf v. Taylor*, 23 U.S. (10 Wheat.) 152, 173 (1825) (Marshall, C.J.) (quotation marks omitted); *see also Badger v. Badger*, 69 U.S. 87, 94 (1864) ("In many other [equity] cases [statutes of limitations] act upon the analogy of the like limitation at law.").

Most relevant here, when plaintiffs brought a claim for *equitable* restitution—the equitable remedy that, per the government, is analogous to present-day disgorgement—courts would typically apply the same statute of limitations as *legal* restitution. *Restatement (First) of Restitution* §148, cmts. b, d, f (1937). Courts recognized that principles of repose applied equally to both forms of restitution. *Id.* cmt. d.

The questions of equity this Court must reach to reverse are narrow. This case, for example, does not implicate the question that has divided the circuits on whether government actions for *injunctions* are subject to statutes of limitations under the "concurrent remedies" doctrine when the government also seeks civil *penalties*. *Compare FEC v. Williams*, 104 F.3d 237 (9th Cir. 1996), *with, e.g., United States v. Banks*, 115 F.3d 916 (11th Cir. 1997).[11] Nor must the Court address any other broad question about how old equitable doctrines relate to modern enforcement

---

[11] The Court denied the Solicitor General's petition for certiorari. *FEC v. Williams*, 522 U.S. 1015 (1997).

actions. Here, the government brings a claim for "equitable disgorgement" that is some combination of (1) a suit for civil penalties by the government; and (2) a restitution suit between private plaintiffs—both subject to statutes of limitations. The only question even potentially raised here is whether an equity court would have permitted *that claim* to proceed without any time limit.

The answer is no. An on-point decision from Chancery is lacking only because SEC-type disgorgement claims were unknown before law and equity merged. But an ancient equity court, just like a modern court, would have recognized that civil penalties and disgorgement are two peas in a pod: Both claims are brought by the government as enforcer of the laws, both yield recoveries payable to the government, and both are calculated the same way. Most likely, an equity court would have concluded that disgorgement is a "penalty" or "forfeiture" and applied §2462 by its terms. Alternatively, it might have applied the concurrent remedies doctrine (in cases where the SEC sought both penalties and disgorgement) or the doctrine that equitable claims import analogous legal statutes of limitations (in all cases, regardless of whether the SEC sought penalties).

For one or both of these reasons, an equity court would have rejected the government's attempt to wriggle free of the limitations period. Nineteenth-century courts vigilantly enforced time bars on equitable claims brought by private plaintiffs. And they were even more vigilant about imposing time bars on government enforcement actions. They would not

have allowed the government to seek money sanctions with no time limit whatsoever.

C. If Necessary, This Court Should Hold That SEC Disgorgement Claims Are Not "Equitable" Remedies Outside §2462.

In Petitioner's view, whether SEC disgorgement claims are "equitable" is irrelevant. But if the Court believes that question is dispositive, it has only one answer. No chancellor at equity would have recognized SEC disgorgement claims.

1. That is so for the same reason that drove *Gabelli*: The government is the wrong plaintiff, seeking the wrong relief. The "discovery rule" the government sought in *Gabelli* had historically applied to defrauded plaintiffs seeking to recover for their losses, including the government when it sued as an injured party. 133 S. Ct. at 1221-22; *see Exploration Co. v. United States*, 247 U.S. 435, 447 (1918) (this rule was "undisputed doctrine of courts of equity"). But when the government sought to extend that rule to "an enforcement action," the Court rejected the attempt. 133 S. Ct. at 1221-22. It explained that the "Government is ... a different kind of plaintiff" seeking "a different kind of relief." *Id.* at 1223. When the government was not "suing to recover its loss," it could not invoke equitable rules applied in favor of injured parties. *Id.* at 1222. *Gabelli* accords with myriad decisions that examine *with specificity* whether chancery courts typically granted a particular remedy; if there is no such record, the remedy is not "equitable." *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318-19 (1999); *Knudson*, 534 U.S. at

712; *Montanile*, 136 S. Ct. at 657.

Here, courts of equity did not provide the remedy the SEC calls "disgorgement." Nowhere is there record of equity courts allowing the government, as enforcer, not injured party, to obtain a retrospective money judgment based on a violation of public laws. The Restatement (First) of Restitution, written in the 1930s, does not discuss such "disgorgement." Nor do the treatises of Blackstone, Pomeroy, or Story. The sovereign could bring other types of equitable actions, such as actions to abate public nuisances. *E.g.*, 2 Story §923. But such actions were "rare" and "principally confined to informations seeking preventative relief." *Id.* Indeed, Blackstone relates that while the government could obtain money sanctions for public nuisances, it did so via "public prosecution," "indictment," and "fine"—not actions in equity courts. 4 Blackstone, *Commentaries* *167-68.

At the certiorari stage, the government quoted the Second Circuit's statement that "chancery courts possessed the power to order equitable disgorgement in the eighteenth century," analogizing to equitable remedies like accounting, constructive trust, and restitution. *SEC v. Cavanagh*, 445 F.3d 105, 118-20 (2d Cir. 2006). The Second Circuit acknowledged that equity granted these remedies in favor of injured private parties, not the government as enforcer, but deemed that distinction "inapposite" based on this Court's statement in *Grupo Mexicano* that equity courts "go 'much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are

involved.'" *Id.* at 118 n.29 (quoting *Grupo Mexicano*, 527 U.S. at 326).

This argument fails for the same reason as the government's similar argument in *Gabelli*. Government "enforcement action[s]" differ from traditional equitable actions not just in the plaintiff's identity, but in the very *nature* of the claim and "kind of relief" sought. 133 S. Ct. at 1223. As this Court explained in *Knudson*, the essential premise of these traditional equitable claims was that the defendant had property "belonging in good conscience *to the plaintiff*," and equity would "transfer title ... to a plaintiff who was ... *the true owner*." *Knudson*, 534 U.S. at 213-14 & n.2 (emphasis added). Government enforcement actions, by contrast, do not vindicate an owner's property interest. The Court's statement in *Grupo Mexicano* is similarly off point: That case was discussing injunctive relief, and merely pointed out that when such indisputably equitable relief is at issue, "the public interest" carries greater weight in the equitable balancing than "only private interests." 527 U.S. at 326 (quotation marks omitted). It did not suggest that legal claims brought by private plaintiffs would transform into equitable claims if brought by the government.

Tull v. United States, 481 U.S. 412 (1987), is consistent with this view. There, the government argued that a suit seeking money sanctions for violations of "the Clean Water Act is similar to an action for disgorgement of improper profits, traditionally considered an equitable remedy." 481 U.S. at 424. But *Tull* deemed that "a poor analogy" because disgorgement "is a remedy only for

restitution," which is "limited to 'restoring the status quo and ordering the return of that which rightfully belongs to the'" injured party. *Id.* (quoting *Porter*, 328 U.S. at 404). Likewise, this Court's cases characterizing disgorgement-type remedies as "equitable" have uniformly restored property to rightful owners. *See Kansas v. Nebraska*, 135 S. Ct. 1042, 1057 (2015) (disgorgement from Nebraska to Kansas "prevent[s] a geographically favored State from appropriating more than its share of a river"); *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 293 (1960) (recognizing "equitable jurisdiction to restore lost wages" to employees); *United States v. Moore*, 340 U.S. 616, 618 (1951) (equitable power to provide "restitution to the tenant of all overcharges" for illegal rents); *Porter*, 328 U.S. at 402 (similar).

Equity courts thus adhered to the same line §2462 draws: Suits to redress private injuries differ fundamentally from enforcement actions that extract money sanctions. When the government brings suits of the second type, it cannot rely on rules for the first.

2. SEC disgorgement claims also differ from equitable restitution because they impose a personal money judgment, without tracing "specific assets ... back to a violation." *SEC v. Quan*, 817 F.3d 583, 594 (8th Cir. 2016); *supra* at 35-36. As *Knudson* explained, for "restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession." 534 U.S. at 214; *Montanile*, 136 S. Ct at 658-59 (restitution claim is legal, not equitable, when money comes from

defendant's general assets).[12]

This lack of a traceability requirement vastly expands disgorgement's scope. It allows the SEC to require disgorgement of funds that go to third parties—as occurred in this case and others. *Supra*, at 35-36. An equity court would not have allowed recovery of such funds because they are not, and never were, "in the defendant's possession." *Knudson*, 534 U.S. at 214.

3. Again and again, the SEC has urged courts, successfully, to create a "disgorgement" remedy that is different from, and broader than, equitable restitution. Simply put, per the SEC, "Disgorgement Isn't Restitution." SEC, Report Pursuant to Section 308(c) of the Sarbanes-Oxley Act of 2002 at 19, http://bit.ly/2lJ2HVN; *see also id.* at 3 n.2 ("the concepts" of disgorgement and restitution "are distinct"). For this reason, too, the SEC cannot now avoid any limitations period by claiming disgorgement is the *same* as equitable restitution.

As previously noted, statutes of limitations applied to equitable restitution claims—either via "statutes specifically applicable to equitable proceedings," or

---

[12] *Knudson* noted a "limited exception for an accounting of profits." 534 U.S. at 214 n.2. Under this remedy, a plaintiff "entitled to a constructive trust on particular property ... may also recover profits produced by the defendant's use of that property, even if he cannot identify a particular res containing" them. *Id.* Here, though, the SEC sought disgorgement of the funds that Petitioner *originally* misappropriated, not additional *profits*. Pet. App. 10a.

because of the "concurrent legal remedy" doctrine, or "by analogy to the statute of limitations." *Restatement (First) of Restitution* §148, cmt. f (1937); *see id.* cmts. b, d. Such courts also applied the equitable defense of laches. *Id.* cmt. c. Yet the SEC's position is that the "concurrent legal remedy" doctrine and the laches defense should not apply *because it is the government*, and that it should get a special, government-friendly presumption against application of a statute of limitations. *Supra*, at 46-49; *cf.* Pet. For Cert. at 15, *FEC v. Williams*, 522 U.S. 1015 (1997) (No. 97-601), 1997 WL 33549957 (concurrent-remedy doctrine inapplicable because it "involve[s] litigation between private parties in which the rule of strict construction of statutes of limitation asserted against the government [i]s not implicated"). The SEC cannot have it both ways: it cannot claim disgorgement is "equitable" because chancery courts recognized restitution claims by private plaintiffs, while avoiding the statute of limitations because the SEC is *not* a private plaintiff.

The government has persuaded courts to distinguish disgorgement from equitable restitution in other respects. For instance, in *Teo*, the SEC persuaded the Third Circuit to hold that "[t]he analytic framework for determining a remedy in an SEC enforcement suit is different from private suits." 746 F.3d at 105. The court held that unlike in private suits, the SEC must produce evidence merely supporting a "reasonable approximation" of the profits of transactions, which "creates a presumption of illegal profits," causing the burden to shift to the defendant to

show that the disgorgement figure is "unreasonable." *Id.* (quotation marks omitted). This government-friendly rule exists because "the risk of uncertainty should fall on the wrongdoer whose illegal conduct created the uncertainty." *Id.* Again, the government should not be able to pick and choose when it should get special government-friendly treatment.

Of course, all of this does not suggest that Congress cannot, or has not, authorized the SEC to seek disgorgement. Rather, it means that disgorgement, as presently applied, would not have been recognized as an "equitable" remedy before the merger of law and equity. So, even if §2462 contained an atextual exception for equitable claims, disgorgement would not fit.

CONCLUSION

The judgment of the Tenth Circuit should be reversed.

Respectfully submitted,

CLINTON W. MARRS
MARRS GRIEBEL LAW, LTD.
1000 Gold Ave, SW
Albuquerque, NM 87102
(505) 433-3926
clinton@marrslegal.com

DAVID A. STRAUSS
SARAH M. KONSKY
JENNER & BLOCK SUPREME COURT AND APPELLATE CLINIC AT THE UNIVERSITY OF CHICAGO LAW SCHOOL
1111 E. 60th Street
Chicago, IL 60637
(773) 834-3189

ADAM G. UNIKOWSKY
Counsel of Record
ZACHARY C. SCHAUF
JENNER & BLOCK LLP
1099 New York Ave., NW,
Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

JAMES DAWSON
JENNER & BLOCK LLP
353 N. Clark St
Chicago, IL 60654

CORD
AND
RIEFS.

Supreme Court, U.S.
FILED
DEC - 9 2016
OFFICE OF THE CLERK

No. 16-529

In the Supreme Court of the United States

CHARLES R. KOKESH, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT

IAN HEATH GERSHENGORN
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

ANNE K. SMALL
General Counsel
SANKET J. BULSARA
Deputy General Counsel
MICHAEL A. CONLEY
Solicitor
HOPE HALL AUGUSTINI
DANIEL STAROSELSKY
Senior Litigation Counsels
SARAH R. PRINS
Senior Counsel
Securities And Exchange Commission
Washington, D.C. 20549

QUESTION PRESENTED

Whether the Securities and Exchange Commission's equitable claims for disgorgement are subject to the five-year statute of limitations in 28 U.S.C. 2462, which applies to claims for "any civil fine, penalty, or forfeiture."

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Discussion 7
Conclusion 13

TABLE OF AUTHORITIES

Cases:

Feltner v. *Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998) 8
Gabelli v. *SEC*, 133 S. Ct. 1216 (2013) 2, 3, 8
Lampf, Pleva, Lipkind, Prupis & Petigrow v. *Gilbertson*, 501 U.S. 350 (1991) 11
Meeker v. *Lehigh Valley R.R. Co.*, 236 U.S. 412 (1915) 8
Porter v. *Warner Holding Co.*, 328 U.S. 395 (1946) 2, 8
Riordan v. *SEC*, 627 F.3d 1230 (D.C. Cir. 2010) 9
SEC v. *Banner Fund Int'l*, 211 F.3d 602 (D.C. Cir. 2000) 9
SEC v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963) 4
SEC v. *Cavanagh*, 445 F.3d 105 (2d Cir. 2006) 8
SEC v. *Graham*, 823 F.3d 1357 (11th Cir. 2016) 7, 10
SEC v. *Pentagon Capital Mgmt.*, 725 F.3d 279 (2d Cir. 2013), cert. denied, 134 S. Ct. 2896 (2014) 9
SEC v. *Rind*, 991 F.2d 1486 (9th Cir.), cert. denied, 510 U.S. 963 (1993) 9, 10
SEC v. *Tambone*, 550 F.3d 106 (1st Cir. 2008), reh'g en banc granted and opinion withdrawn, 573 F.3d 54 (1st Cir. 2009), reinstated in relevant part, 597 F.3d 436 (1st Cir. 2010) 9

Cases—Continued: Page

Sheldon v. *Metro-Goldwyn Pictures Corp.*, 309 U.S. 390 (1940) 8
United States v. *Mann*, 26 F. Cas. 1153 (D.N.H. 1812) 9
United States v. *92 Buena Vista Ave.*, 507 U.S. 111 (1993) 9
United States v. *Telluride Co.*, 146 F.3d 1241 (10th Cir. 1998) 6
United States SEC v. *Maxxon, Inc.*, 465 F.3d 174, 1179 (10th Cir. 2006), cert. denied, 550 U.S. 905 (2007) 2
Wilson v. *Garcia*, 471 U.S. 261 (1985) 11

Statutes and rule:

Investment Advisers Act of 1940, 15 U.S.C. 80b-1 *et seq.*:
15 U.S.C. 80b-3(k) 2
15 U.S.C. 80b-5(a)(1) 4
15 U.S.C. 80b-5(b)(3) 4
15 U.S.C. 80b-9(d) 2
Investment Company Act of 1940, 15 U.S.C. 80a-1 *et seq.*:
15 U.S.C. 80a-41(d) 2
Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, 104 Stat. 931 2
Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.*:
15 U.S.C. 78a note 2
15 U.S.C. 78j(b) (1988) (§ 10(b)) 11
15 U.S.C. 78u(d)(1) 2

Statutes and rule—Continued: Page

15 U.S.C. 78u(d)(5) 2
15 U.S.C. 78u-3(e) 2
15 U.S.C. 77h-1(e) 2
28 U.S.C. 2462 ..... *passim*
17 C.F.R. 240.10b-5 (1990) (Rule 10b-5) 11

Miscellaneous:

H.R. Rep. No. 616, 101st Cong., 2d Sess. (1990) 11
U.S. Sec. & Exch. Comm'n:
SEC Regional Offices, https://www.sec.gov/page/sec-regional-offices (last visited Dec. 9, 2016) 11
Select SEC and Market Data, Fiscal 2015, www.sec.gov/reportspubs/select-sec-and-market-data/secstats2015.pdf (last visited Dec. 9, 2016) 11

In the Supreme Court of the United States

No. 16-529

CHARLES R. KOKESH, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 834 F.3d 1158. The opinion of the district court (Pet. App. 20a-47a) is not published in the *Federal Supplement* but is available at 2015 WL 11142470.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 2016. The petition for a writ of certiorari was filed on October 18, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Congress has authorized the Securities and Exchange Commission (SEC) to bring civil enforcement actions seeking relief for violations of the Securities Exchange Act of 1934 (Exchange Act), the Investment Advisers Act of 1940 (Advisers Act), and the

Investment Company Act of 1940 (Investment Company Act). See 15 U.S.C. 78u(d)(1); 15 U.S.C. 80b-9(d); 15 U.S.C. 80a-41(d). Such actions may seek equitable relief as well as civil monetary penalties. See *ibid.*; Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, 104 Stat. 931 (15 U.S.C. 78a note); see also 15 U.S.C. 77h-1(e), 78u-3(e), 80b-3(k)(5) (authorizing the Commission to order "accounting and disgorgement" in administrative proceedings).

"In any action or proceeding brought or instituted by the Commission under any provision of the securities laws, * * * any Federal court may grant[] any equitable relief that may be appropriate or necessary for the benefit of investors." 15 U.S.C. 78u(d)(5). Federal courts' equitable powers in such cases include the authority to order "disgorge[ment]" of profits that were "acquired in violation" of those laws. *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398-399 (1946); see, *e.g.*, *United States SEC* v. *Maxxon, Inc.*, 465 F.3d 1174, 1179 (10th Cir. 2006), cert. denied, 550 U.S. 905 (2007).

b. Congress has not specified a statute of limitations for an SEC enforcement action alleging a violation of the Exchange Act, the Advisers Act, or the Investment Company Act. But Congress has enacted a statute of limitations, 28 U.S.C. 2462, that governs "penalty provisions throughout the U.S. Code." *Gabelli* v. *SEC*, 133 S. Ct. 1216, 1219 (2013). "This statute of limitations is not specific to * * * securities law; it governs many penalty provisions * * * . Its origins date back to at least 1839, and it took on its current form in 1948." *Ibid.* Section 2462 states:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of

> any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

28 U.S.C. 2462.

In *Gabelli*, this Court considered the applicability of Section 2462 in a case in which the SEC sought civil monetary penalties—that is, sanctions "which go beyond compensation, are intended to punish, and label defendants wrongdoers." 133 S. Ct. at 1223; see *id.* at 1224 (declining to "[a]pply[] a discovery rule to Government penalty actions"). The Court noted that "[t]he SEC also sought injunctive relief and disgorgement, claims the District Court found timely on the ground that they were not subject to [Section] 2462." *Id.* at 1220 n.1. The Court explained that "[t]hose issues are not before us." *Ibid.*

2. Petitioner owned and controlled two Commission-registered investment advisers: Technology Funding, Ltd., and Technology Funding, Inc. (collectively, the Advisers). See Pet. App. 3a-4a. The Advisers conducted the day-to-day operations of four business development companies: Technology Funding Medical Partners I, L.P.; Technology Funding Partners III, L.P.; Technology Funding Venture Partners IV, An Aggressive Growth Fund, L.P.; and Technology Funding Venture Partners V, An Aggressive Growth Fund, L.P. (collectively, the Funds). See *id.* at 2a-3a. The Funds "raised money from investors through public securities offerings and invested in private start-up companies that focused on technology, biotechnology, and medical diagnostics." *Ibid.*

Each Fund had a contract with the Advisers, signed by petitioner. Pet. App. 3a. The contracts prescribed how the Advisers would be compensated and "prohibited any payments to the Advisers that were not expressly specified." *Ibid.* Those restrictions on payment were consistent with the Advisers Act, which permits advisers of business development companies to be compensated "on the basis of a share of capital gains" only if the compensation does not exceed twenty percent of the clients' gains. 15 U.S.C. 80b-5(a)(1) and (b)(3); see Pet. App. 3a; see generally *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 189 (1963) (explaining that investment advisers, which owe clients a fiduciary duty of good faith and full disclosure, generally should not "share in [the] profits of [their] clients") (internal quotation marks omitted).

Beginning in 1995, and continuing through 2006, petitioner misappropriated $34.9 million from the Funds. See Pet. App. 3a, 5a. From 1995 through 2006, petitioner directed the Advisers' treasurer to take $23.8 million from the Funds to reimburse the Advisers for salaries and bonuses paid to officers of the Advisers (including petitioner). See *id.* at 3a. During the same period, he directed the treasurer to take $5 million from the Funds to make reimbursements for the Advisers' office rent. See *ibid.* And in 2000, he "caused the Advisers to take $6.1 million" from the Funds—an amount that petitioner told the SEC was for "tax distributions" but that largely went directly to petitioner (even though he paid "only $10,304 in federal taxes that year"). *Ibid.* Those payments "violated the contracts between the Advisers and the Funds" and exceeded the statutory limitations on compensation for investment advisers. *Id.* at 4a. Petitioner also took

various steps—including causing the Funds to make false filings with the SEC—to conceal the payments from the Funds' investors and others. *Ibid.*; see *id.* at 22a-24a.

3. a. In 2009, the SEC brought this civil enforcement action against petitioner in the United States District Court for the District of New Mexico, alleging violations of the Exchange Act, the Advisers Act, and the Investment Company Act. See Pet. App. 1a-2a; SEC C.A. Br. 7-8. After a trial, a jury found violations of all three statutes. The jury determined that petitioner had "knowingly and willfully converted the Funds' assets to his own use or to the use of another," and that he had "knowingly and substantially assisted the Advisers in defrauding the Funds, in filing false and misleading reports with the SEC, and in soliciting proxies using false and misleading proxy statements." Pet. App. 4a-5a; see SEC C.A. Br. 3 (jury found petitioner liable for primary violations and for aiding and abetting violations).

b. Based on the jury's liability determination, the SEC sought entry of final judgment ordering petitioner to "disgorge the amounts that [he] misappropriated in violation of [the] securities laws." Pet. App. 24a. The district court granted that request, ordering disgorgement of $34,927,329, plus prejudgment interest. See *id.* at 46a-47a; see also *id.* at 24a-32a, 36a-40a, 45a-47a (permanently enjoining petitioner from violating specific provisions of the securities laws, based on a "reasonable and substantial likelihood" of further violations, and imposing a monetary penalty of $2,354,593 for conduct within the five-year limitations period in Section 2462).

The district court rejected petitioner's argument that the disgorgement remedy constituted a "penalty" covered by the Section 2462 statute of limitations. The court explained that the equitable remedy of disgorgement covered only "ill-gotten gains earned by the defendant while in violation of securities laws," Pet. App. 41a (quoting *United States* v. *Telluride Co.*, 146 F.3d 1241, 1247 (10th Cir. 1998)), and that such compensation was "remedial" and "equitable" rather than punitive, *id.* at 42a; see *id.* at 43a-44a ("Requiring [petitioner] to give up his ill-gotten gains—even those he received many years ago and those he caused to be paid to third parties—is quintessentially equitable."); *id.* at 44a-45a.

c. On appeal, petitioner contended that Section 2462's five-year statute of limitations barred the district court's disgorgement order. The Tenth Circuit rejected that argument, holding that disgorgement is not a "penalty" or "forfeiture" under Section 2462. Pet. App. 10a-17a; see *id.* at 7a-9a (reaching the same conclusion with respect to the district court's injunction).

First, the court of appeals held that disgorgement is not a "penalty." Pet. App. 10a. The court explained that "the disgorgement remedy does not inflict punishment," but "leaves the wrongdoer in the position he would have occupied had there been no misconduct." *Id.* at 11a (citation and internal quotation marks omitted). While recognizing that "disgorgement serves a deterrent purpose," the court observed that "it does so only by depriving the wrongdoer of the benefits of wrongdoing." *Ibid.* The court further explained that "there is nothing punitive about requiring a wrongdoer to pay for all the funds he caused to be improperly

diverted to others as well as to himself." *Id.* at 12a (citation omitted).

Second, rejecting the holding of *SEC* v. *Graham*, 823 F.3d 1357 (11th Cir. 2016), the court of appeals concluded that disgorgement is not a "forfeiture." Pet. App. 13a; see *id.* at 13a-14a. The court stated that, "[w]hen the term *forfeiture* is linked in [Section] 2462 to the undoubtedly punitive actions for a *civil fine* or *penalty*, it seems apparent that Congress was contemplating the meaning of *forfeiture* in [a] historical sense." *Id.* at 15a. As used in its "historical sense," the court explained, the term "forfeiture" referred to an in rem procedure to seize property based solely on its involvement in an offense, without regard to whether "[t]he owner of the seized property" was "completely innocent of any wrongdoing" or whether "the value of the property taken" had any "relation to any loss to others or gain to the owner." *Id.* at 14a-15a. The court concluded that "[t]he nonpunitive remedy of disgorgement does not fit in that company"—particularly given that "we are to construe [Section] 2462 in the government's favor to avoid a limitations bar." *Id.* at 15a, 16a.

DISCUSSION

This case presents an issue that has divided the circuits: whether Section 2462 applies to claims for disgorgement. The court of appeals correctly held that disgorgement is not a "penalty" or a "forfeiture" to which that provision applies. 28 U.S.C. 2462. But because the issue is important to the administration of the securities laws, and the courts of appeals have reached conflicting conclusions, this Court's review is warranted.

1. The court of appeals correctly held that disgorgement is not a "penalty" or "forfeiture" within the meaning of Section 2462.

Disgorgement is relief "given in accordance with the principles governing equity jurisdiction." *Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, 399 (1940); see *SEC* v. *Cavanagh*, 445 F.3d 105, 118-120 (2d Cir. 2006) ("[C]hancery courts possessed the power to order equitable disgorgement in the eighteenth century."). Its purpose is "not to inflict punishment but to prevent an unjust enrichment." *Sheldon*, 309 U.S. at 399; see *Feltner* v. *Columbia Pictures Television, Inc.*, 523 U.S. 340, 352 (1998) ("[W]e have characterized as equitable * * * actions for disgorgement of improper profits."). Because of disgorgement's quintessentially remedial nature, disgorgement "differs greatly from * * * damages and penalties." *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 402 (1946) (discussing equitable remedy of restitution); see *Gabelli* v. *SEC*, 133 S. Ct. 1216, 1223 (2013) (explaining that a "penalty" within the meaning of Section 2462 is a sanction "intended to punish" the defendant).

Disgorgement also is not a "forfeiture" within the meaning of Section 2462. In *Meeker* v. *Lehigh Valley R.R. Co.*, 236 U.S. 412 (1915), the Court stated that "[t]he words 'penalty or forfeiture' in" a predecessor version of Section 2462 "refer to something imposed in a punitive way for an infraction of a public law." *Id.* at 423. Disgorgement, by contrast, is intended to prevent unjust enrichment, not to punish a wrongdoer for having committed the violation. See *Sheldon*, 309 U.S. at 399. The court of appeals also observed that the word "forfeiture" has historically been used to refer to an "in rem procedure to take 'tangible property used

in criminal activity,'" without regard to the culpability of the property's owner. Pet. App. 14a (quoting *United States* v. *92 Buena Vista Ave.*, 507 U.S. 111, 118 (1993) (opinion of Stevens, J.)); see, *e.g.*, *United States* v. *Mann*, 26 F. Cas. 1153, 1154 (D.N.H. 1812) (Story, J.). The order at issue here, by contrast, imposed "an equitable obligation to return a sum equal to the amount wrongfully obtained, rather than a requirement to replevy a specific asset." *SEC* v. *Banner Fund Int'l*, 211 F.3d 602, 617 (D.C. Cir. 2000) (describing disgorgement remedy).

2. The decision below is consistent with decisions of other courts of appeals that have held that the Section 2462 statute of limitations does not apply to disgorgement. See *Riordan* v. *SEC*, 627 F.3d 1230, 1234-1235 & n.1 (D.C. Cir. 2010) (rejecting contention that disgorgement is a "forfeiture covered by § 2462," and stating that "there is no statute of limitations for SEC disgorgement actions"); *SEC* v. *Tambone*, 550 F.3d 106, 148 (1st Cir. 2008) (stating that Section 2462 applies "only to penalties sought by the SEC," not to disgorgement), reh'g en banc granted and opinion withdrawn, 573 F.3d 54 (1st Cir. 2009), reinstated in relevant part, 597 F.3d 436 (1st Cir. 2010); see also *SEC* v. *Rind*, 991 F.2d 1486, 1490-1493 (9th Cir.) (holding that the Commission's claims for disgorgement are not subject to any statute of limitations, without discussing Section 2462), cert. denied, 510 U.S. 963 (1993); cf. *SEC* v. *Pentagon Capital Mgmt.*, 725 F.3d 279, 288 (2d Cir. 2013) (affirming order to disgorge amounts wrongfully obtained more than five years before the Commission's complaint was filed, without addressing the applicability of Section 2462), cert. denied, 134 S. Ct. 2896 (2014).

The decision below conflicts, however, with the Eleventh Circuit's decision in *SEC* v. *Graham*, 823 F.3d 1357 (11th Cir. 2016), which held that "[Section] 2462's statute of limitations applies to disgorgement." *Id.* at 1363. In *Graham*, the court of appeals concluded that a "forfeiture" occurs "when a person is forced to turn over money or property because of a crime or wrongdoing," *ibid.*, and that disgorgement is "[t]he act of giving up something (such as profits illegally obtained) on demand or by legal compulsion." *Ibid.* (citation omitted; brackets in original). The court found "no meaningful difference in the definitions of disgorgement and forfeiture" and therefore deemed disgorgement to be a form of "forfeiture." *Ibid.*[1] *Graham* cannot be reconciled with the decision below, or with the decisions of the other courts of appeals (see p. 9, *supra*) that have construed Section 2462 not to apply to disgorgement.[2]

3. a. The question presented is important and warrants resolution by this Court.

"Disgorgement plays a central role in the enforcement of the securities laws." *Rind*, 991 F.2d at 1491. The Commission seeks disgorgement in the majority of its enforcement actions, so as to deprive wrongdoers of unjust enrichment obtained as a result of securities-

---

[1] Because the court in *Graham* held that an SEC disgorgement remedy is a "forfeiture" within the meaning of Section 2462, the court found it unnecessary to decide whether disgorgement is also a "penalty" under that provision. See 823 F.3d at 1363 n.3.

[2] The question whether Section 2462 applies to disgorgement is currently presented in a fully briefed case pending in the Second Circuit. See *United States SEC* v. *Wyly*, No. 15-2821 (2d Cir.). It is also presented in a fully briefed and argued case pending in the Eighth Circuit. See *SEC* v. *Crawford*, No. 16-1405 (8th Cir.) (argued Nov. 16, 2016).

law violations. See, *e.g.*, U.S. SEC, *Select SEC and Market Data, Fiscal 2015*, www.sec.gov/reportspubs/select-sec-and-market-data/secstats2015.pdf (last visited Dec. 9, 2016); see also H.R. Rep. No. 616, 101st Cong., 2d Sess. 17 (1990).

In the Eleventh Circuit, where the SEC has two regional offices, see U.S. SEC, *SEC Regional Offices*, https://www.sec.gov/page/sec-regional-offices (last visited Dec. 9, 2016), the Commission is currently impeded by the decision in *Graham* from obtaining the full disgorgement remedies to which it is entitled. *Graham* affects SEC enforcement actions filed in nine federal judicial districts, as well as SEC administrative proceedings that are appealed to the Eleventh Circuit. The decision therefore stands as a significant obstacle to national uniformity in administration of the securities laws. See *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 357-361 (1991) (opinion of Blackmun, J.) (indicating that the "federal interests in predictability and judicial economy counsel" national uniformity with respect to the statute of limitations for private claims for violation of Section 10(b) and SEC Rule 10b-5); see also, *e.g.*, *Wilson* v. *Garcia*, 471 U.S. 261, 266 (1985) ("Few areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitations.") (citation omitted).

b. This case is an appropriate vehicle for resolution of the question presented. Petitioner adequately preserved his argument that the disgorgement order in this case ran afoul of Section 2462. He contended in the court of appeals that "an order of disgorgement and a permanent injunction can qualify as punitive measures for purposes of [Section] 2462"; that "[g]iv-

en the impossibility of restoring the status quo *ante* * * * , the District Court's order of disgorgement * * * serve[s] only to penalize [petitioner]"; and that "the District Court's $53,004,432 disgorgement order is a form of punitive forfeiture imposed on [petitioner] for his proscribed conduct, going far beyond remedying the damage caused to the harmed parties by [his] action." Pet. C.A. Br. 45, 47-49 (citation and internal quotation marks omitted; final set of brackets in original).

If this Court grants certiorari and resolves the question presented in petitioner's favor, the disgorgement award in the district court's final judgment would be reduced. That judgment orders disgorgement of approximately $34.9 million. See Pet. App. 5a, 32a. A significant portion of the funds that petitioner misappropriated, however, were taken more than five years before the Commission filed its complaint in this case. See D. Ct. Doc. 181, at 1-2 (Jan. 21, 2015) (stating that "the limitations period for purposes of Section 2462 began on October 27, 2004, five years before the complaint, and ended on October 27, 2009," and that petitioner "took $5,004,773 within the limitations period"). Thus, while application of Section 2462 would not wholly preclude the imposition of a disgorgement remedy here, it would substantially reduce the amount that petitioner could be required to disgorge.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

IAN HEATH GERSHENGORN
Acting Solicitor General

ANNE K. SMALL
General Counsel
SANKET J. BULSARA
Deputy General Counsel
MICHAEL A. CONLEY
Solicitor
HOPE HALL AUGUSTINI
DANIEL STAROSELSKY
Senior Litigation Counsels
SARAH R. PRINS
Senior Counsel
Securities And Exchange Commission

DECEMBER 2016

ECORD
AND
BRIEF

MAR 17 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 16-529

In the Supreme Court of the United States

CHARLES R. KOKESH, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT

SANKET J. BULSARA
Acting General Counsel
MICHAEL A. CONLEY
Solicitor
JACOB H. STILLMAN
Senior Advisor to the Solicitor
HOPE HALL AUGUSTINI
DANIEL STAROSELSKY
Senior Litigation Counsels
SARAH R. PRINS
Senior Counsel
Securities and Exchange Commission
Washington, D.C. 20549

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record
MALCOLM L. STEWART
Deputy Solicitor General
ELAINE J. GOLDENBERG
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the Securities and Exchange Commission's equitable claims for disgorgement are subject to the five-year statute of limitations in 28 U.S.C. 2462, which applies to claims for "any civil fine, penalty, or forfeiture."

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statutory provisions involved 1
Statement 2
Summary of argument 9
Argument 13
A. Disgorgement is not a "penalty" under Section 2462 14
1. As used in Section 2462, a "penalty" is a punishment 14
2. Disgorgement in SEC actions is not a "penalty" .. 16
3. Petitioner's arguments that disgorgement is a "penalty" under Section 2462 lack merit 25
B. Disgorgement is not a "forfeiture" under Section 2462 32
C. Extending Section 2462 to cover disgorgement is inconsistent with the purposes of statutes of limitations and would have harmful consequences 41
D. The canon of narrow construction reinforces the conclusion that Section 2462 does not apply to disgorgement 49
Conclusion 51
Appendix — Statutory provisions 1a

TABLE OF AUTHORITIES

Cases:

Adams v. *Woods*, 6 U.S. (2 Cranch) 336 (1805) 41, 50
Albemarle Paper Co. v. *Moody*, 422 U.S. 405 (1975) 43
Alexander v. *United States*, 509 U.S. 544 (1993) 32
Austin v. *United States*, 509 U.S. 602 (1993).... 34, 35, 36, 38
BP Am. Prod. Co. v. *Burton*, 549 U.S. 84 (2006)..... 29, 49
Badaracco v. *Commissioner*, 464 U.S. 386 (1984) 50
Bell v. *Hood*, 327 U.S. 678 (1946) 18

Cases—Continued: Page

Bigelow v. *RKO Radio Pictures*, Inc., 327 U.S. 251 (1946) 30
Brady v. *Daly*, 175 U.S. 148 (1899) 17, 26
Browning-Ferris Indus. of Vt., Inc. v. *Kelco Disposal, Inc.*, 492 U.S. 257 (1989) 28, 34
California v. *American Stores Co.*, 495 U.S. 271 28(1990) 18
Chattanooga Foundry & Pipe Works v. *City of Atlanta*, 203 U.S. 390 (1906) 26
Coghlan v. *NTSB*, 470 F.3d 1300 (11th Cir. 2006) 28
Department of Revenue v. *Kurth Ranch*, 511 U.S. 767 (1994) 28
E.I. Dupont De Nemours & Co. v. *Davis*, 264 U.S. 456 (1924) 12, 42, 50
FTC v. *Bronson Partners, LLC*, 654 F.3d 359 (2d Cir. 2011) 16
FTC v. *Gem Merch. Corp.*, 87 F.3d 466 (11th Cir. 1996) 48
Gabelli v. *SEC*, 133 S. Ct. 1216 (2013) ..... *passim*
Hartford-Empire Co. v. *United States*, 323 U.S. 386 (1945) 19
Hecht Co. v. *Bowles*, 321 U.S. 321 (1944) 28
Holmberg v. *Armbrecht*, 327 U.S. 392 (1946) 42
Hudson v. *United States*, 522 U.S. 93 (1997) 28
Huntington v. *Attrill*, 146 U.S. 657 (1892) 15
Johnson v. *SEC*, 87 F.3d 484 (D.C. Cir. 1996) 17, 44
Kansas v. *Nebraska*, 135 S. Ct. 1042 (2015) 18
Keene Corp. v. *United States*, 508 U.S. 200 (1993) 4
Kelly v. *Robinson*, 479 U.S. 36 (1986) 25, 26, 32
Landsberg, In re, 14 F. Cas. 1065 (E.D. Mich. 1870) 4, 14, 15

Cases—Continued: Page

Life & Cas. Ins. Co. of Tenn. v. *McCray*, 291 U.S. 566 (1934) 14
Luis v. *United States*, 136 S. Ct. 1083 (2016) 42
Louisville Joint Stock Land Bank v. *Radford*, 295 U.S. 555 (1935) 19
Martin v. *United States SEC*, 734 F.3d 169 (2d Cir. 2013) 22
McDonnell v. *United States*, 136 S. Ct. 2355 (2016) 34
Meeker v. *Lehigh Valley R.R.*, 236 U.S. 412 (1915) 10, 11, 14, 27, 33
Mitchell v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960) 18
O'Sullivan v. *Felix*, 233 U.S. 318 (1914) 14
Occidental Life Ins. Co. v. *EEOC*, 432 U.S. 355 (1977) 43
Official Comm. of Unsecured Creditors of World-Com, Inc. v. *SEC*, 467 F.3d 73 (2d Cir. 2006) 23
Order of R.R. Telegraphers v. *Railway Express Agency*, 321 U.S. 342 (1944) 46
Pasquantino v. *United States*, 544 U.S. 349 (2005) 32
Peisch v. *Ware*, 8 U.S. (4 Cranch) 347 (1808) 34
Petrella v. *Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014) 45
Porter v. *Warner Holding Co.*, 328 U.S. 395 (1946) 2, 18, 26, 27, 41
Priebe & Sons, Inc. v. *United States*, 332 U.S. 407 (1947) 28
Riordan v. *SEC*, 627 F.3d 1230 (D.C. Cir. 2010) 44
SEC v. *Amerindo Inv. Advisors*, 639 Fed. Appx. 752 (2d Cir.), cert. denied, 136 S. Ct. 2429 (2016) 19
SEC v. *Bhagat*, No. C 01-21073, 2008 WL 4890890 (N.D. Cal. Nov. 12, 2008) 20

Cases—Continued: Page

SEC v. *Blatt*, 583 F.2d 1325 (5th Cir. 1978) 19
SEC v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963) 5
SEC v. *Cavanagh*, 445 F.3d 105 (2d Cir. 2006) 16, 18
SEC v. *Commonwealth Chem. Sec., Inc.*, 574 F.2d 90 (2d Cir. 1978) 2, 16, 17, 2
SEC v. *Crawford*, No. 11-cv-3656 (D. Minn.) (filed Dec. 21, 2011) 46
SEC v. *Custable*, 796 F.3d 653 (7th Cir. 2015) 20
SEC v. *First City Fin. Corp.*, 890 F.2d 1215 (D.C. Cir. 1989) 22, 30
SEC v. *Fischbach Corp.*, 133 F.3d 170 (2d Cir. 1997) 19, 20
SEC v. *Graham*:
21 F. Supp. 3d 1300 (S.D. Fla. 2014), aff'd in part, rev'd in part, and remanded, 823 F.3d 1357 (11th Cir. 2016) 48
823 F.3d 1357 (11th Cir. 2016) 43
SEC v. *Leslie*, No. C 07-3444, 2010 WL 2991038 (N.D. Cal. July 29, 2010) 17
SEC v. *Lorin*, 869 F. Supp. 1117 (S.D.N.Y. 1994) 22, 30
SEC v. *Lund*, 570 F. Supp. 1397 (C.D. Cal. 1983) 19
SEC v. *Manor Nursing Cntrs., Inc.*, 458 F.2d 1082 (2d Cir. 1972) 30
SEC v. *Mantria Corp.*, No. 09-cv-2676, 2012 WL 3778286 (D. Colo. Aug. 30, 2012) 3
SEC v. *Moran*, No. 92-cv-5209, 2012 WL 19386 (S.D.N.Y. Jan. 3, 2012) 20
SEC v. *Palmisano*, 135 F.3d 860 (2d Cir.), cert. denied, 525 U.S. 1023 (1998) 21
SEC v. *Rind*, 991 F.2d 1486 (9th Cir.), cert. denied, 510 U.S. 963 (1993) 42, 43, 44, 45

Cases—Continued: Page

SEC v. *Tambone*, 550 F.3d 106 (2008), reh'g en banc granted and opinion withdrawn, 573 F.3d 54 (2009), reinstated in relevant part, 597 F.3d 436 (1st Cir. 2010) 44
SEC v. *Texas Gulf Sulphur Co.*, 446 F.2d 1301 (2d Cir.), cert. denied, 404 U.S. 1005 (1971) 22, 47
SEC v. *Wyly*:
950 F. Supp. 2d 547 (S.D.N.Y. 2013) 47
56 F. Supp. 3d 394 (S.D.N.Y. 2014) 43
117 F. Supp. 3d 381 (S.D.N.Y. 2015) 48
Salman v. *United States*, 137 S. Ct. 420 (2016) 29
Schine Chain Theatres, Inc. v. *United States*, 334 U.S. 110 (1948) 17, 18
Sheldon v. *Metro-Goldwyn Pictures Corp.*, 309 U.S. 390 (1940) 15, 18
Solem v. *Helm*, 463 U.S. 277 (1983) 28
Stevens v. *Gladding*, 58 U.S. (17 How.) 447 (1855) 19, 37
Taylor v. *United States*, 44 U.S. (3 How.) 197 (1845) 36
Telsey, In re, 144 B.R. 563 (Bankr. S.D. Fla. 1992) 30
3M Co. v. *Browner*, 17 F.3d 1453 (D.C. Cir. 1994) 4
Tull v. *United States*, 481 U.S. 412 (1987) 24
United States v. *92 Buena Vista Ave.*, 507 U.S. 111 (1993) 35, 40
United States v. *Bajakajian*, 524 U.S. 321 (1998) 35, 36, 40
United States v. *Chouteau*, 102 U.S. 603 (1881) 15
United States v. *Crescent Amusement Co.*, 323 U.S. 173 (1944) 18
United States v. *Hoar*, 26 F. Cas. (D. Mass. 1821) 29
United States v. *Mann*, 26 F. Cas. 1153 (C.C.D.N.H. 1812) (No. 15,718) 32, 35, 36

Cases—Continued: Page

United States v. *Maillard*, 26 F. Cas. 1140 (S.D.N.Y. 1871) 4
United States v. *Mayo*, 26 F. Cas. 1230 (C.C.D. Mass. 1813) 50
United States v. *Reisinger*, 128 U.S. 398 (1888) 15, 33
United States v. *Rodgers*, 466 U.S. 475 (1984) 41
United States v. *Telluride Co.*, 146 F.3d 1241 (10th Cir. 1998) 41
United States v. *Thompson*, 98 U.S. 486 (1879) 29
United States v. *Universal Mgmt. Servs., Inc.*, 191 F.3d 750 (6th Cir. 1999), cert. denied, 530 U.S. 1274 (2000) 48
United States v. *Ursery*, 518 U.S. 267 (1996) 28, 36
United States v. *Whited & Wheless, Ltd.*, 246 U.S. 552 (1918) 47
United States ex rel. Marcus v. *Hess*, 317 U.S. 537 (1943) 38
United States SEC v. *Quan*, 817 F.3d 584 (8th Cir. 2016) 19, 22
Zacharias v. *SEC*, 569 F.3d 458 (D.C. Cir. 2009) 16, 30

Constitution, statutes and regulations:

U.S. Const.:
Amend. V, Double Jeopardy Clause 36
Amend. VIII, Excessive Fines Clause 36
Act of Apr. 30, 1790, ch. 9, § 32, 1 Stat. 119 4
Act of Mar. 2, 1799, ch. 22, § 89, 1 Stat. 695 4
Act of Mar. 26, 1804, ch. 40, § 3, 2 Stat. 290 4
Act of Mar. 1, 1823, ch. 21, § 35, 3 Stat. 739 3
Act of Feb. 28, 1839, ch. 36, § 4, 5 Stat. 322 3

Statutes and regulations—Continued: Page

Bankruptcy Code, 11 U.S.C. 101 *et seq.*:
Ch. 5, 11 U.S.C. 523(a)(7) 25, 30
Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, § 5(b)(2), 102 Stat. 4681 (15 U.S.C. 78t-1(b)(2)) 44, 19a
Insider Trading Sanctions Act of 1984, Pub. L. No. 98-376, § 2, 98 Stat. 1264 23
Investment Advisers Act of 1940, 15 U.S.C. 80b-1 *et seq.* 2
15 U.S.C. 80b-3(k)(5) 2
15 U.S.C. 80b-5(a) 6
15 U.S.C. 80b-9(d) 2
Investment Company Act of 1940, 15 U.S.C. 80a-1 *et seq.* 2
15 U.S.C. 80a-9(e) 24
15 U.S.C. 80a-41(d) 2
Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, § 103(b)(2), 109 Stat. 756 (15 U.S.C. 78u(d)(4)) 44, 8a
Rev. Stat. § 1047 (1874) 4
Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745:
§ 305(b), 116 Stat. 779 (15 U.S.C. 78u(d)(5)) 3, 24
§ 308, 116 Stat. 784 (15 U.S.C. 7246) 20, 24, 17a
§ 308(a), 116 Stat. 784 (15 U.S.C. 7246(a)) 21, 27, 17a
§ 308(c)(1), 116 Stat. 785 (15 U.S.C. 7246(c)(1)) 3, 45, 18a
§ 803(3) 116 Stat. 801 (11 U.S.C. 523(a)(19)) 31
Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, 104 Stat. 931 ..... 2, 23

Statutes and regulations—Continued: Page

Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.* 2
15 U.S.C. 78t-1(b)(2) 3, 19a
15 U.S.C. 78u 23, 24, 1a
15 U.S.C. 78u(d)(1) 2, 3, 18, 41, 4a
15 U.S.C. 78u(d)(3) 17, 23, 24, 5a
15 U.S.C. 78u(d)(4) 3, 8a
15 U.S.C. 78u(d)(5) 18, 24, 41, 8a
15 U.S.C. 78u-1(d)(5) 3, 45
15 U.S.C. 78u-3(e) 2
15 U.S.C. 78u-6(b)(1) 24, 25
Tax Reform Act of 1969, Pub. L. No. 91-172, Tit. IX, § 902(a), 83 Stat. 710 (26 U.S.C. 162(f)) 31
Wall Street Transparency and Accountability Act of 2010, Pub. L. No. 111-203, Tit. VII, § 744, 124 Stat. 1735 (7 U.S.C. 13a-1(d)(3)) 24
15 U.S.C. 77h-1(e) 2
18 U.S.C. 981(a)(1)(C) 39
18 U.S.C. 981(d) 46
18 U.S.C. 1963(a)(3) 39
18 U.S.C. 3282 41
19 U.S.C. 1621 40
26 U.S.C. 6110 31
28 U.S.C. 791 (1926) 4
28 U.S.C. 791 (1940) 4
28 U.S.C. 1658 (Supp. II 1990) 43
28 U.S.C. 1658(b) 45
28 U.S.C. 2461 37
28 U.S.C. 2462 ..... *passim*, 1a

Regulations—Continued: Page

17 C.F.R.:
Section 201.1100 21
Section 201.1102 22

Miscellaneous:

Jeremy Bentham, *The Rationale of Punishment* (1830) 42
Black's Law Dictionary (1st ed. 1891) 14, 32, 33, 36
2 *Bouvier's Law Dictionary* (1852) 15
2 *Burrill's Law Dictionary* (1871) 15
Stefan D. Cassella, *Asset Forfeiture Law in the United States* (2d ed. 2013) 40
Steven R. Glaser, *Statutes of Limitations for Equitable and Remedial Relief in SEC Enforcement Actions*, 4 Harv. Bus. L. Rev. 129 (2014) 42
J. Gould & G. Tucker, *Notes on the Revised Statutes of the United States and the Subsequent Legislation of Congress* (1889) 15
6 Thomas Lee Hazen, *Treatise on the Law of Securities Regulation* (6th ed. Supp. 2015) 16
H.R. Rep. No. 308, 80th Cong., 1st Sess. (1947) 4, 37
H.R. Rep. No. 355, 98th Cong, 1st Sess. (1983) 23
H.R. Rep. No. 616, 101st Cong., 2d Sess. (1990) 2, 23, 45
Samuel Johnson et al., *Johnson's English Dictionary* (1834) 33
Mitchell A. Lowenthal et al., Special Project, *Time Bars in Specialized Federal Common Law: Federal Rights of Action and State Statutes of Limitations*, 65 Cornell L. Rev. 1011 (1980) 44
Catherine E. Maxson, Note, *The Applicability of Section 2462's Statute of Limitations to SEC Enforcement Suits In Light of the Remedies Act of 1990*, 94 Mich. L. Rev. 512 (1995) 42

Miscellaneous—Continued: Page

Thomas D. Moffitt, Office of Chief Counsel, IRS, Memorandum No. 201619008, at 1 (Jan. 29, 2016), https://www.irs.gov/pub/irs-wd/201619008.pdf 31

60 N.Y. Jur. 2d *Forfeitures and Penalties* (2d ed. 2016) 38

Note, *Developments in the Law—Statutes of Limitations*, 63 Harv. L. Rev. 1177 (1950) 15

Press Release, U.S. SEC, *VimpelCom to Pay $795 million in Global Settlement for FCPA Violations* (Feb. 18, 2016), www.sec.gov/news/pressrelease/2016-34.html (last visited Mar. 26, 2017) 21

2 Restatement (Third) of Restitution and Unjust Enrichment (2011) 16

S. Rep. No. 205, 107th Cong., 2d Sess. (2002) 24

S. Rep. No. 337, 101st Cong., 2d Sess. (1990) 23

SEC, *Select SEC and Market Data* (2005-2016), https://www.sec.gov/reports (last visited Mar. 26, 2017) 46

Walter Scott, *Lay of the Last Minstrel*, Canto VI (5th ed. 1806) 38

3 St. George Tucker, *Blackstone's Commentaries: with Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia* (1803) 33

U.S. SEC, *FY 2015 Annual Performance Report & FY 2017 Annual Performance Plan*, https://www.sec.gov/about/reports/sec-fy2015-fy2017-annual-performance.pdf (last visited Mar. 26, 2017) 46

Miscellaneous—Continued: Page

Urska Velikonja, *Public Compensation for Private Harm: Evidence from the SEC's Fair Fund Distributions*, 67 Stan. L. Rev. 331 (2015) 20

Noah Webster, *An American Dictionary of the English Language* (1828):

Vol. 1 37

Vol. 2 15

In the Supreme Court of the United States

No. 16-529

CHARLES R. KOKESH, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 834 F.3d 1158. The opinion of the district court (Pet. App. 20a-47a) is not published in the *Federal Supplement* but is available at 2015 WL 11142470.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 2016. The petition for a writ of certiorari was filed on October 18, 2016, and was granted on January 13, 2017. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-21a.

STATEMENT

1. a. Congress has authorized the Securities and Exchange Commission (SEC or Commission) to bring civil enforcement actions seeking injunctive relief for violations of (*inter alia*) the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. 78a *et seq.*, the Investment Advisers Act of 1940 (Advisers Act), 15 U.S.C. 80b-1 *et seq.*, and the Investment Company Act of 1940 (Investment Company Act), 15 U.S.C. 80a-1 *et seq.* See 15 U.S.C. 78u(d)(1); 15 U.S.C. 80b-9(d); 15 U.S.C. 80a-41(d). For decades, district courts have ordered defendants in such actions to "disgorge" the amount of profits "acquired in violation" of the securities laws. *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398-399 (1946); see, *e.g.*, *SEC* v. *Commonwealth Chem. Sec., Inc.*, 574 F.2d 90, 95, 102-103 (2d Cir. 1978) (Friendly, J.).

In 1990, Congress authorized the Commission to seek civil monetary penalties in such actions. See H.R. Rep. No. 616, 101st Cong., 2d Sess. 13 (1990) (1990 House Report). Congress provided for several tiers of penalties, depending on the nature of the wrongdoing and the losses it caused. See Securities Enforcement Remedies and Penny Stock Reform Act of 1990 (Enforcement Remedies Act), Pub. L. No. 101-429, 104 Stat. 931. Congress also authorized the Commission to order "accounting and disgorgement" in administrative proceedings. See 15 U.S.C. 77h-1(e), 78u-3(e), 80b-3(k)(5).

In 2002, Congress provided that, "[i]n any action or proceeding brought or instituted by the Commission under any provision of the securities laws, * * * any Federal court may grant[] any equitable relief that may be appropriate or necessary for the benefit of

investors." Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 305(b), 116 Stat. 779; see 15 U.S.C. 78u(d)(5). District courts rely on that provision in ordering disgorgement, see, *e.g.*, *SEC* v. *Mantria Corp.*, No. 09-cv-02676, 2012 WL 3778286, at *1 (D. Colo. Aug. 30, 2012); see also 15 U.S.C. 78u(d)(1), a remedy that Congress has referenced in a number of enactments, see, *e.g.*, 15 U.S.C. 78u(d)(4), 78t-1(b)(2), 7246(c)(1).

b. Congress has not specified a statute of limitations for SEC actions alleging a violation of the Exchange Act, the Advisers Act, or the Investment Company Act (except with respect to actions seeking civil penalties for insider trading, see 15 U.S.C. 78u-1(d)(5)). A general statute of limitations, 28 U.S.C. 2462, however, governs "penalty provisions throughout the U.S. Code." *Gabelli* v. *SEC*, 133 S. Ct. 1216, 1219 (2013).

The "origins" of Section 2462 "date back to at least 1839." *Gabelli*, 133 S. Ct. at 1219. In that year, Congress enacted a provision stating that "no suit or prosecution shall be maintained, for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States, unless the same suit or prosecution shall be commenced within five years from the time when the penalty or forfeiture accrued," provided that "[t]he person of the offender or the property liable for such penalty or forfeiture" was within the United States during that period. Act of Feb. 28, 1839, ch. 36, § 4, 5 Stat. 322.[1] That provision

---

[1] Congress had previously enacted provisions placing time limits on suits for penalties or forfeitures, but those provisions differ from the 1839 enactment in wording or scope (or both), and sometimes conflicted with each other. See Act of Mar. 1, 1823, ch. 21,

was carried forward, with minor changes, in the Revised Statutes enacted in 1874, see Rev. Stat. § 1047, 18 Stat. 193, and in a 1926 codification, see 28 U.S.C. 791 (1926); see also 28 U.S.C. 791 (1940).

In 1948, when Congress comprehensively revised the judicial code, Section 2462 "took on its current form." *Gabelli*, 133 S. Ct. at 1219. The 1948 reviser's note explained that the provision was "[b]ased on * * * R.S. 1047[]. Changes were made in phraseology." H.R. Rep. No. 308, 80th Cong., 1st Sess. A191 (1947) (1947 House Report); see *Keene Corp.* v. *United States*, 508 U.S. 200, 209 (1993) (Court "do[es] not presume that the [1948] revision worked a change in the underlying substantive law unless an intent to make such a change is clearly expressed") (brackets, citation, and internal quotation marks omitted). As then revised, and today, the provision states:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

28 U.S.C. 2462.

---

§ 35, 3 Stat. 739; Act of Mar. 26, 1804, ch. 40, § 3, 2 Stat. 290; Act of Mar. 2, 1799, ch. 22, § 89, 1 Stat. 695; Act of Apr. 30, 1790, ch. 9, § 32, 1 Stat. 119; see also *3M Co.* v. *Browner*, 17 F.3d 1453, 1458 n.7 (D.C. Cir. 1994) ("ancestor of the Act of 1839" is "unclear"); *United States* v. *Maillard*, 26 F. Cas. 1140, 1141-1142 (S.D.N.Y. 1871) (discussing conflict between early provisions); *In re Landsberg*, 14 F. Cas. 1065, 1066-1067 (E.D. Mich. 1870).

In *Gabelli*, this Court considered the applicability of Section 2462 in an SEC action involving civil monetary penalties, which "go beyond compensation, are intended to punish, and label defendants wrongdoers." 133 S. Ct. at 1223; see *id.* at 1224. The Court held that the five-year period for seeking civil penalties began to run when the defendant's allegedly fraudulent conduct occurred, not when the government knew or should have known of the violation. *Id.* at 1220-1224. The Court further noted that "[t]he SEC also sought injunctive relief and disgorgement, claims the District Court found timely on the ground that they were not subject to [Section] 2462." *Id.* at 1220 n.1. The Court explained that "[t]hose issues are not before us." *Ibid.*

2. Petitioner owned and controlled two Commission-registered investment advisers (collectively, the Advisers). See Pet. App. 3a. The Advisers conducted the day-to-day operations of four business development companies (collectively, the Funds) that "raised money from" tens of thousands of small investors "through public securities offerings" and invested it in "private start-up companies." *Id.* at 2a-3a; see D. Ct. Doc. 162, at 73, 111 (Nov. 11, 2014) (investors were limited partners in the Funds). The Advisers owed the Funds a fiduciary duty "of utmost good faith[] and full and fair disclosure." *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194 (1963) (citations omitted).

Each Fund had a contract with the Advisers, signed (and largely written) by petitioner. See Pet. App. 3a; see also D. Ct. Doc. 162, at 74-75. The contracts prescribed how the Advisers would be compensated, barred certain kinds of reimbursements, and "prohibited any payments to the Advisers that were

not expressly specified." Pet. App. 3a-4a. Those restrictions were consistent with the Advisers Act, which places limits on compensating advisers "on the basis of a share of capital gains." 15 U.S.C. 80b-5(a); see Pet. App. 3a.

Beginning in 1995, and continuing through 2006, petitioner misappropriated $34.9 million from the Funds, either keeping that money himself or directing it to cover Advisers-related expenses that he otherwise would have had to pay. See Pet. App. 3a, 5a. From 1995 through 2006, petitioner directed the Advisers' treasurer to take $23.8 million from the Funds to reimburse the Advisers for salaries and bonuses paid to the Advisers' officers (including petitioner). See *id.* at 3a. During the same period, he directed the treasurer to take $5 million from the Funds to make reimbursements for the Advisers' office rent. See *ibid.* And in 2000, he "caused the Advisers to take $6.1 million" from the Funds—an amount that petitioner told the SEC was for "tax distributions" but that largely went directly to petitioner (even though he paid "only $10,304 in federal taxes that year"). *Id.* at 3a-4a.

Those payments "violated the contracts between the Advisers and the Funds" and exceeded the statutory limitations on compensation for investment advisers. Pet. App. 4a. They also drained money from investors. For instance, while petitioner paid himself and a fellow officer $8.4 million in total bonuses between 2000 and 2005, the Funds lost money in all but one of those years, for total losses of $85 million. See C.A. Record on Appeal (ROA) 1542-1544; SEC Trial Ex. 396.

Petitioner took various steps to conceal the illicit payments. See Pet. App. 4a; *id.* at 22a-24a. For example, he misstated the salary and bonus payments in false proxy statements distributed to investors, hid payments from the Funds' directors, and caused the filing of dozens of false reports with the Commission through 2007. See *id.* at 22a-24a. Because information about the flow of money from the Funds was available to very few people, see C.A. ROA 1238-1239, 1544, petitioner was able to hide his wrongdoing for a lengthy period.

3. a. In 2009, the SEC brought this civil enforcement action against petitioner, alleging violations of the Exchange Act, the Advisers Act, and the Investment Company Act. See Pet. App. 1a-2a; SEC C.A. Br. 7-8. The evidence at trial established that petitioner had controlled all aspects of the Advisers' business and the Funds' accounts. It also established that he had knowingly engaged in fraud, and had concealed that fraud, in order to benefit himself and to keep up appearances at the Advisers, harming large numbers of small investors in the process. See, *e.g.*, D. Ct. Doc. 162, at 56-63, 73-83, 99-100, 112-118. Petitioner used his illicit gains to maintain an extravagant lifestyle, including by purchasing a gated mansion, buying and renovating a private polo ground, and keeping a personal stable of more than 50 horses. See *id.* at 26, 66-71, 117-118.

The jury found violations of all three statutes. The jury determined that petitioner had "knowingly and willfully converted the Funds' assets to his own use or to the use of another," and that he had "knowingly and substantially assisted the Advisers in defrauding the Funds, in filing false and misleading reports with the

SEC, and in soliciting proxies using false and misleading proxy statements." Pet. App. 4a-5a.

b. The SEC sought entry of final judgment ordering petitioner to "disgorge the amounts that [he] misappropriated in violation of [the] securities laws." Pet. App. 24a. The district court ordered petitioner to "disgorge" $34,927,329, plus prejudgment interest. *Id.* at 46a-47a. The court rejected petitioner's argument that the disgorgement remedy constituted a "penalty" covered by Section 2462. The court explained that disgorgement covered only "ill-gotten gains earned by the defendant while in violation of securities laws," *id.* at 41a (citation omitted), and that such a remedy is "remedial" and "equitable" rather than punitive, *id.* at 42a; see *id.* at 43a-45a.

The district court also enjoined petitioner from violating specific provisions of the securities laws and ordered him to pay a civil monetary penalty for conduct within Section 2462's five-year limitations period. See Pet. App. 24a-32a, 36a-40a, 45a-47a. The court found petitioner's actions to be "egregious," noting that he had caused "substantial losses to investors" through a "vast" fraud with a "high degree of scienter," had used the proceeds to live "an extravagant lifestyle," had "specifically targeted smaller investors * * * because they would be less likely to sue if they discovered his schemes," and had shown no remorse. *Id.* at 30a-31a, 39a. The court imposed a "third-tier" penalty of $2,354,593, reflecting the fact that petitioner's offense had involved fraud and caused serious harm. *Id.* at 45a.

c. On appeal, petitioner contended that Section 2462's five-year statute of limitations barred the dis-

gorgement order. The Tenth Circuit rejected that argument. See Pet. App. 10a-17a.

First, the court of appeals held that disgorgement is not a "penalty." Pet. App. 10a-13a. The court explained that "the disgorgement remedy does not inflict punishment," but "leaves the wrongdoer in the position he would have occupied had there been no misconduct." *Id.* at 11a (citation and internal quotation marks omitted). While recognizing that "disgorgement serves a deterrent purpose," the court observed that "it does so only by depriving the wrongdoer of the benefits of wrongdoing." *Ibid.*; see *id.* at 12a.

Second, the court of appeals held that disgorgement is not a "forfeiture." Pet. App. 13a-17a. The court stated that, "[w]hen the term *forfeiture* is linked in [Section] 2462 to the undoubtedly punitive actions for a *civil fine* or *penalty*, it seems apparent that Congress was contemplating the meaning of *forfeiture* in [a] historical sense." *Id.* at 15a. As used in that sense, the court explained, "forfeiture" referred to an in rem procedure to seize property without regard to whether the owner was "innocent" or whether "the value of the property" had any "relation to any loss to others or gain to the owner." *Id.* at 14a. The court concluded that "[t]he nonpunitive remedy of disgorgement does not fit in that company," particularly given that any ambiguity in Section 2462 must be resolved "in the government's favor to avoid a limitations bar." *Id.* at 15a, 16a.

SUMMARY OF ARGUMENT

This Court has already construed the terms "penalty" and "forfeiture" as those words are used in Section 2462: "The words 'penalty or forfeiture' in this section

refer to something imposed in a punitive way for an infraction of a public law." *Meeker* v. *Lehigh Valley R.R.*, 236 U.S. 412, 423 (1915) (interpreting predecessor to Section 2462); see *Gabelli* v. *SEC*, 133 S. Ct. 1216, 1223 (2013). The disgorgement remedy in SEC actions is not punitive, and Section 2462 therefore does not apply to it.

A. Disgorgement in SEC actions is not a "penalty" under Section 2462 because it is not a punishment. Penalties can be imposed regardless of whether a defendant realizes a financial benefit from a violation of law. They can and usually do deprive the defendant of money to which he has a lawful entitlement, thus leaving him worse off than he would have been if he had committed no violation. The equitable remedy of disgorgement, by contrast, simply prevents unjust enrichment by forcing a defendant to give up funds that he acquired unlawfully, thereby placing him in the same position that he would have occupied but for the securities-law violation. Disgorgement is thus analogous to restitution and to the divestiture remedy in an antitrust case, neither of which is a penalty. And while a remedy need not be compensatory in order to avoid being penal, disgorgement in SEC actions is often compensatory, and thus unambiguously non-punitive, because district courts frequently return disgorged funds to injured investors. In enacting various civil-penalty provisions over the last few decades against the backdrop of the well-established disgorgement remedy, Congress has demonstrated its understanding that disgorgement is not itself a penalty.

B. Disgorgement in SEC actions also is not a Section 2462 "forfeiture." Like "penalty," the word "for-

feiture" in Section 2462 refers to something punitive. See *Meeker*, 236 U.S. at 423. That is particularly apparent given the other terms on the list of remedies to which Section 2462 applies, since those additional remedies ("civil fine" and "penalty") are both punitive measures. Accordingly, for all of the same reasons that disgorgement is not a "penalty" under Section 2462, disgorgement likewise is not a Section 2462 "forfeiture."

Neither the 1839 Congress nor the 1948 Congress that enacted the current version of the statute-of-limitation provision would have envisioned that "forfeiture" could cover a personal judgment for disgorgement of ill-gotten gains. Petitioner has not identified any form of historical forfeiture that resembled the disgorgement remedy in an SEC action. At the relevant points in time, "forfeiture" would have been understood to refer either to *in rem* forfeiture, directed at property that was contraband or the instrumentality of a crime, or to a fine. Disgorgement is fundamentally different from both those remedies. It was not until the 1970s that existing forfeiture provisions were expanded to allow for *in personam* criminal forfeiture and to cover criminal "proceeds." Congress's more expansive use of the term "forfeiture" in statutes that long postdate Section 2462 has no meaningful bearing on the proper interpretation of that statute or its predecessors.

C. Extending Section 2462 to cover disgorgement in SEC actions would be inconsistent with the purposes of statutes of limitations and would have harmful consequences. Although penalties are virtually always subject to time limits, government suits involving other kinds of relief may be unrestricted by any time

bar. Rather, in determining whether the equitable remedy of disgorgement is appropriate in particular cases, courts may take into account the passage of time, along with other facts and circumstances. That has been the status quo with respect to disgorgement for nearly half a century.

During that period, Congress has mentioned disgorgement approvingly in statutory enactments, and it has imposed time limits on particular government and private securities actions without ever placing such restrictions on disgorgement. Petitioner fails to identify any abuses resulting from that state of affairs, and the SEC has strong incentives to bring suit as quickly as possible notwithstanding the inapplicability of Section 2462 to claims for disgorgement. Applying Section 2462 to disgorgement would not spare wrongdoers from having to defend themselves in SEC enforcement actions, since the SEC could continue to sue without any time restriction to obtain remedial injunctions, or could sue within five years after the end of the wrongdoing for at least some amount of disgorgement (and civil penalties). That interpretation of the statute would simply allow defendants like petitioner to keep all or a substantial portion of the money that they stole from investors, thus increasing the financial incentives to violate the law and to hide any violations from authorities.

D. This Court has often applied the interpretive canon that "[s]tatutes of limitation sought to be applied to bar rights of the Government, must receive a strict construction in favor of the Government." *E.I. Dupont De Nemours & Co.* v. *Davis*, 264 U.S. 456, 462 (1924). That narrow-construction rule reinforces the conclusion that claims for disgorgement are not sub-

ject to Section 2462's five-year limit. At the least, neither "penalty" nor "forfeiture" clearly encompasses a remedy that, like disgorgement, is not "intended to punish," *Gabelli*, 133 S. Ct. at 1223, but simply prevents a defendant from retaining money acquired through a violation of the law for which he has been found liable. The narrow-construction canon—which rests on the principle that the sovereign is subject only to a statute of limitations to which it clearly consents—is therefore a sufficient basis to conclude that disgorgement in an SEC action falls outside the scope of the "penalt[ies]" and "forfeiture[s]" that Section 2462 covers.

ARGUMENT

Section 2462 cannot be reasonably read to encompass all forms of monetary relief ordered by a court in a government action. For instance, as petitioner concedes (*e.g.*, Br. 28-32), Section 2462 does not cover a compensatory damages award. The government therefore would have unlimited time under that provision (in the absence of some other applicable statute of limitations) to sue for compensatory damages for itself or on behalf of some private party. The omission of such damages from the specific list of remedies set forth in Section 2462—"civil fine, penalty, or forfeiture"—highlights the fact that Congress used those terms to refer to discrete, historically defined categories, and not as a way of capturing any kind of order requiring the payment of money that a court might issue in a suit in which the government is the plaintiff. Petitioner has not contended that the disgorgement remedy in SEC actions is a "fine." The only question, then, is whether the remedy is a "penalty" or a "forfeiture" as Congress would have understood those terms

at the relevant point in time. The disgorgement remedy does not fall into either category.

A. Disgorgement Is Not A "Penalty" Under Section 2462

1. As Used In Section 2462, A "Penalty" Is A Punishment

The word "penalty" is "a term of varying and uncertain meaning." *Life & Cas. Ins. Co. of Tenn.* v. *McCray*, 291 U.S. 566, 574-575 (1934); see *Black's Law Dictionary* 883-884 (1st ed. 1891) ("The terms 'fine,' 'forfeiture,' and 'penalty' are often used loosely, and even confusedly.") (citation omitted). As used in Section 2462, however, this Court has construed the word "penalty" to mean a punishment—"something imposed in a punitive way for an infraction of a public law." *Meeker* v. *Lehigh Valley R.R.*, 236 U.S. 412, 423 (1915) (interpreting predecessor to Section 2462); see *ibid.* ("strictly remedial" order is not punitive); see also *Gabelli* v. *SEC*, 133 S. Ct. 1216, 1223 (2013) (stating that, under Section 2462, "penalties * * * go beyond compensation, are intended to punish, and label defendants wrongdoers"); *O'Sullivan* v. *Felix*, 233 U.S. 318, 324 (1914) (interpreting predecessor to Section 2462 and stating that "'penalty' involves the idea of punishment for the infraction of the law, and is commonly used as including any extraordinary liability to which the law subjects a wrongdoer in favor of the person wronged, not limited to the damages suffered").

That interpretation is consistent with nineteenth-century understandings of the term. In *In re Landsberg*, 14 F. Cas. 1065 (E.D. Mich. 1870), the court construed the term "penalty" in the 1839 predecessor to Section 2462 to mean a "fixed pecuniary mulct in-

curred by the violation of some law." *Id.* at 1067; see J. Gould & G. Tucker, *Notes on the Revised Statutes of the United States and the Subsequent Legislation of Congress* 350 (1889) (relying on *Landsberg* to define "penalty" as used in the 1874 predecessor to Section 2462); see also, *e.g.*, *United States* v. *Reisinger*, 128 U.S. 398, 402 (1888) ("the words 'penalty,' 'liability,' and 'forfeiture' * * * have been used by the great masters of crown law and the elementary writers as synonymous with the word 'punishment'"); *Huntington* v. *Attrill*, 146 U.S. 657, 666-667 (1892) (stating that "[s]trictly and primarily," the words "penal" and "penalty" mean "punishment, whether corporal or pecuniary") (citing, *inter alia*, *United States* v. *Chouteau*, 102 U.S. 603 (1881)). Dictionaries from the relevant period reflect the same understanding. See, *e.g.*, 2 *Burrill's Law Dictionary* 286 (1871) ("A punishment; a punishment imposed by statute as a consequence of the commission of a certain specified offense."); 2 *Bouvier's Law Dictionary* 324 (1852) ("By penalty is understood, also, the punishment inflicted by law for its violation."); 2 Noah Webster, *An American Dictionary of the English Language* 32 (1828) (*Webster's Dictionary*) (defining "penalty" as "[t]he suffering in person or property which is annexed by law or judicial decision to the commission of a crime, offense or trespass, as a punishment") (cited in Pet. Br. 24).[2]

---

[2] The accepted understanding of "penalty" was the same when Section 2462 was enacted in 1948. See, *e.g.*, *Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, 399-400 (1940) ("penalty" in copyright-infringement case would "giv[e] to the copyright proprietor profits which are not attributable to the infringement"); see also generally Note, *Developments in the Law—Statutes of Limi-*

2. Disgorgement In SEC Actions Is Not A "Penalty"

Under that approach, disgorgement of an amount obtained through violation of the securities laws is not a "penalty." Penalties can and typically do deprive defendants of money to which they are lawfully entitled, thereby punishing them by rendering them worse off financially than they would have been if they had committed no violation. Disgorgement, by contrast, simply prevents unjust enrichment by forcing a defendant to divest funds that he acquired unlawfully.

a. Disgorgement deprives the defendant of the benefit of his wrongdoing, thus returning him to the position he would have occupied absent the illegal conduct. From the defendant's perspective, disgorgement "restore[s] the status quo," *Gabelli*, 133 S. Ct. at 1223 (citation omitted), by taking away the amounts by which he was unjustly enriched. See *SEC* v. *Commonwealth Chem. Sec., Inc.*, 574 F.2d 90, 95 (2d Cir. 1978); see also, *e.g.*, *SEC* v. *Cavanagh*, 445 F.3d 105 (2d Cir. 2006); *FTC* v. *Bronson Partners, LLC*, 654 F.3d 359 (2d Cir. 2011). But it does not deprive the defendant of anything he was rightfully entitled to in the first place, and it is not divorced from the damage to society from the defendant's bad acts. It therefore does not punish. See *Zacharias* v. *SEC*, 569 F.3d 458, 471-473 (D.C. Cir. 2009); see also 6 Thomas Lee Hazen, *Treatise on the Law of Securities Regulation* § 16.2[2][D][1], at 64 (6th ed. Supp. 2015) ("[r]emedies as disgorgement and restitution are not punitive"); cf. 2 Restatement (Third) of Restitution and Unjust Enrichment § 51 cmt. (*k*), at 222 (2011) ("Disgorgement

---

tations, 63 Harv. L. Rev. 1177, 1266 n.736 (1950) (Section 2462 "has received a narrow interpretation").

of wrongful gain is not a punitive remedy. While the remedy will be burdensome to the defendant in practice * * * [he] is ideally left in the position he would have occupied had there been no misconduct.").[3]

The non-punitive character of disgorgement is illustrated by the fact that disgorgement will sometimes be inappropriate even when a securities-law violation has been proved. A defendant can violate those laws without obtaining any money from his unlawful acts, in which case a disgorgement order would be impermissible. See, *e.g.*, *SEC* v. *Leslie*, No. C-07-3444, 2010 WL 2991038, at *39 (N.D. Cal. July 29, 2010). In contrast, a *punishment* for violating the law may be imposed regardless of whether the defendant profits. See, *e.g.*, 15 U.S.C. 78u(d)(3).

Disgorgement is instead remedial—intended to lessen the effects of a violation. It is analogous to restitution to an injured party, "by which [a] defendant is made to disgorge ill-gotten gains or to restore the status quo, or to accomplish both objectives." *Commonwealth*, 574 F.2d at 95 (citation omitted). It is also analogous to the divestiture remedy in an antitrust case, which requires a defendant to divest businesses that it has unlawfully acquired. See *Schine Chain Theatres, Inc.* v. *United States*, 334 U.S. 110, 128 (1948) ("To require divestiture of theatres unlawfully acquired is not to add to the penalties that Congress has provided in the antitrust laws."). Divestiture of wrongfully acquired property "merely deprives

---

[3] The existence of a punishment must be determined objectively. A plainly remedial order—for instance, an award of damages that makes an injured party whole—may nevertheless be experienced by the defendant as costly or painful. See *Brady* v. *Daly*, 175 U.S. 148, 155 (1899); *Johnson* v. *SEC*, 87 F.3d 484, 488 (D.C. Cir. 1996).

a defendant of the gains from his wrongful conduct," thus "undo[ing] what could have been prevented had the defendants not outdistanced the government in their unlawful project." *Ibid.*; see *California* v. *American Stores Co.*, 495 U.S. 271, 295 (1990); *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 189 (1944); see also, *e.g.*, *Cavanagh*, 445 F.3d at 117-118 (analogizing to the remedy of accounting).

Consistent with disgorgement's remedial character, district courts in securities cases regularly order that relief in the exercise of their equitable powers. See 15 U.S.C. 78u(d)(1) and (5). "When Congress entrusts to an equity court the enforcement of [statutory] prohibitions," it invokes "the historic power of equity to provide complete relief." *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291-292 (1960). "[A]ct[ing] in the public interest by restoring the status quo" is "within the recognized power and within the highest tradition of a court of equity." *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 400, 402 (1946); see *Bell* v. *Hood*, 327 U.S. 678, 684 (1946). And when "the public interest is involved" in a suit brought by the government, the court's "equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." *Mitchell*, 361 U.S. at 291 (quoting *Porter*, 328 U.S. 398).

As an equitable remedy, disgorgement is both discretionary and flexible. Cf. *Kansas* v. *Nebraska*, 135 S. Ct. 1042, 1058 (2015) (stating that "disgorgement need not be all or nothing" and that "flexibility is inherent in equitable remedies") (brackets and citation omitted); *Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, 399 (1940) (recovery of profits by injured parties is "appropriate equitable relief inci-

dent to a decree for an injunction," given "not to inflict punishment but to prevent an unjust enrichment"). See, *e.g.*, *Hartford-Empire Co.* v. *United States*, 323 U.S. 386, 435 (1945) ("relief in equity is remedial, not penal"); *Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555, 579 (1935); *Stevens* v. *Gladding*, 58 U.S. (17 How.) 447, 452-455 (1855).

b. Contrary to petitioner's suggestion (*e.g.*, Br. 26-27), disgorgement often is used in an unambiguously compensatory manner. Although compensation is not the test for whether a remedy is non-punitive, and therefore not a penalty, see pp. 25-27, *infra*, a compensatory remedy is necessarily non-penal.

i. When the SEC successfully requests disgorgement in cases involving victimized investors, those funds generally are not paid directly to the Treasury. Rather, they are paid "to the district court, which has discretion over how to disburse them." *United States SEC* v. *Quan*, 817 F.3d 584, 594 (8th Cir. 2016). If feasible, the district court may distribute disgorged funds to a defendant's victims—and it is the Commission's "policy wherever possible * * * to recommend a distribution plan by which a defendant's unlawful gains are paid out to defrauded investors." *SEC* v. *Fischbach Corp.*, 133 F.3d 170, 174 (2d Cir. 1997) (citation and internal quotation marks omitted). The court may give a "receiver or trustee * * * the task of locating those members of the public who were injured by the illegal activity" and of "pay[ing] each injured party an amount determined by the trustee to be fair and equitable." *SEC* v. *Lund*, 570 F. Supp. 1397, 1404 (C.D. Cal. 1983); see, *e.g.*, *SEC* v. *Amerindo Inv. Advisors*, 639 Fed. Appx. 752, 755 (2d Cir.) (receiver), cert. denied, 136 S. Ct. 2429 (2016); *SEC* v.

Blatt, 583 F.2d 1325, 1335 n.30 (5th Cir. 1978) (trustee).

To be sure, cases arise in which returning money to victims would be infeasible and the district court therefore orders that the disgorged money be sent to the Treasury. That has happened in cases in which an attempted distribution to victims "would produce more waste than benefit," *SEC* v. *Bhagat*, No. C-01-21073, 2008 WL 4890890, at *2 (N.D. Cal. Nov. 12, 2008), such as when "the victims can't be located," *SEC* v. *Custable*, 796 F.3d 653, 656 (7th Cir. 2015); see, *e.g.*, *SEC* v. *Moran*, No. 92-civ.-5209, 2012 WL 19386, at *1 (S.D.N.Y. Jan. 3, 2012) (citing "relatively small sum at issue" and "diffuse nature of the underlying fraud"); see also *Fischbach*, 133 F.3d at 176 (distribution that would have been "windfall" to uninjured party was inappropriate). But district courts order distribution of disgorged funds to victims in a significant percentage of cases. One study—considering distributions of "fair funds" (which include civil penalties, see 15 U.S.C. 7246) but not accounting for distributions consisting solely of disgorgement—found that, between 2002 and 2013, courts distributed to defrauded investors nearly $9 billion in funds obtained by SEC enforcement actions, including nearly $3 billion in disgorgement, amounting to an "extensive and sustained effort by a public agency to compensate the victims of misconduct." Urska Velikonja, *Public Compensation for Private Harm: Evidence from the SEC's Fair Fund Distributions*, 67 Stan. L. Rev. 331, 333-334, 352 (2015).[4]

---

[4] In addition, amounts are returned to injured investors through receiverships in SEC actions, see, *e.g.*, 01-cv-11282 Docket entry No. 283, *SEC* v. *Shiv* (S.D.N.Y. Mar. 24, 2009) (stating that portion

ii. Petitioner's contrary description of how disgorgement works is incorrect. First, petitioner states (Br. 26-27) that disgorgement amounts cannot be used to compensate victims unless a civil penalty is also collected. A so-called "fair fund" under the Sarbanes-Oxley Act of 2002, which authorizes distribution of civil penalties to injured investors, is created for a particular case only if a civil penalty is awarded. See 15 U.S.C. 7246(a). But district courts can and do distribute disgorged money to victims, just as they did before 2002, even when no civil penalty is awarded and no "fair fund" exists. See, *e.g.*, 99-cv-289 Docket entry No. 31, *SEC* v. *Lu* (N.D. Cal. Dec. 8, 2005); 07-cv-537 Docket entry No. 39, *SEC* v. *Longs* (E.D. Ark. 2009). Petitioner's description rests on his misreading of a regulation that relates only to "fair funds" and applies only in administrative proceedings. See 17 C.F.R. 201.1100.

Second, petitioner argues (Pet. 27) that "[i]n all cases * * * the SEC has discretion not to compensate victims when it deems compensation infeasible."

---

of disgorgement order was "satisfied" by receiver's distribution of assets), and through parallel criminal proceedings, see, *e.g.*, *SEC* v. *Palmisano*, 135 F.3d 860, 863-864 (2d Cir.) (discussing effect on disgorgement obligation of payments made pursuant to criminal restitution order), cert. denied, 525 U.S. 1023 (1998). A meaningful portion of the disgorgement amounts in SEC actions that do not get distributed to investors is attributable to large awards in a limited number of Foreign Corrupt Practices Act (FCPA) cases, in which the defendants are unjustly enriched by obtaining business through bribery but the injury to investors is diffuse and hard to identify. See, *e.g.*, U.S. SEC, Press Release, *VimpelCom to Pay $795 million in Global Settlement for FCPA Violations* (Feb. 18, 2016), www.sec.gov/news/pressrelease/2016-34.html (last visited Mar 26, 2017).

But the regulation he cites relates only to administrative proceedings, in which the SEC itself decides the feasibility question. See 17 C.F.R. 201.1102; *Martin* v. *United States SEC*, 734 F.3d 169, 170 (2d Cir. 2013) (per curiam). In judicial proceedings, the SEC recommends distribution if feasible, but the district court controls what happens to the funds. See *Quan*, 817 F.3d at 594.[5]

Petitioner correctly observes (Br. 27) that compensation is not the "primary purpose of disgorgement." *Commonwealth*, 574 F.2d at 102. When the SEC seeks disgorgement, it acts in the public interest, to remedy harm to the public at large, rather than standing in the shoes of particular injured parties. See, *e.g.*, *SEC* v. *Lorin*, 869 F. Supp. 1117, 1128-1130 (S.D.N.Y. 1994). It is nevertheless clear that, in practice, disgorgement in SEC enforcement actions has a significant compensatory aspect.

c. The text and history of the securities laws demonstrate Congress's understanding that the disgorgement remedy in SEC actions is not a penalty because it is not punitive.

By the 1980s, district courts had for some time been ordering disgorgement, under their injunctive powers, in SEC suits. See, *e.g.*, *SEC* v. *Texas Gulf Sulphur Co.*, 446 F.2d 1301, 1307-1308 (2d Cir.), cert. denied, 404 U.S. 1005 (1971); *SEC* v. *First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989). But Congress was concerned that "[d]isgorgement of illegal profits * * * merely restores a defendant to his

---

[5] In this case, the district court did not specify what should happen to the amount ordered to be disgorged. See Pet. App. 47a. Petitioner argued that he was insolvent, see D. Ct. Doc. 180, at 3 (Jan. 7, 2015), and he is therefore unlikely to pay anything.

original position without extracting a real penalty for his illegal behavior." H.R. Rep. No. 355, 98th Cong., 1st Sess. 7 (1983) (1983 House Report). Congress therefore authorized the Commission to obtain in insider-trading cases a "civil penalty" that "shall not exceed three times the profit gained or loss avoided as a result of such unlawful purchase or sale." Insider Trading Sanctions Act of 1984, Pub. L. No. 98-376, § 2, 98 Stat. 1264; see 1983 House Report 8 (stating that "[t]he new penalty may be used in addition to existing remedies," including "disgorgement of ill-gotten gains").

In 1990, Congress expanded the Commission's power to seek civil penalties to cover securities-law matters outside the insider-trading context. See 15 U.S.C. 78u(d)(3); Enforcement Remedies Act, Pub. L. 101-429, 104 Stat. 931. The House Report explained that, while securities-law violators could "reap enormous profits," such violators were subject only to "an order of disgorgement," which "merely requires the return of wrongfully obtained profits; it does not result in any actual economic penalty or act as a financial disincentive to engaging in securities fraud." 1990 House Report 17; see *ibid.* ("even a violator who is caught is * * * no worse off financially than if he had not violated the law"); S. Rep. No. 337, 101st Cong., 2d Sess. 9 (1990) (similar); *Official Comm. of Unsecured Creditors of WorldCom, Inc.* v. *SEC*, 467 F.3d 73, 81 (2d Cir. 2006) (Sotomayor, J.). Congress therefore deemed civil penalties "necessary for the deterrence of securities law violations that otherwise may provide great financial returns." 1990 House Report 17.

In 2002, Congress added to 15 U.S.C. 78u a subsection stating that, "[i]n any action or proceeding

brought or instituted by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors." 15 U.S.C. 78u(d)(5); see Sarbanes-Oxley Act of 2002, Pub. L. 107-204, § 305(b), 116 Stat. 779; see also S. Rep. No. 205, 107th Cong., 2d Sess. 27 (2002) (discussing disgorgement). Congress did not place that subsection under the existing heading in 15 U.S.C. 78u for "[m]oney [p]enalties in [c]ivil [a]ctions." 15 U.S.C. 78u(d)(3). Rather, Congress placed the provision in a separate part of Section 78u and gave it its own heading: "[e]quitable [r]elief." Sarbanes-Oxley Act § 305(b), 116 Stat. 779; see 15 U.S.C. 78u(d)(5); *Tull* v. *United States*, 481 U.S. 412, 425 (1987).[6]

Thus, over the lengthy period in which courts have regularly ordered disgorgement at the Commission's behest, Congress has indicated its understanding that disgorgement cannot appropriately be termed a "penalty." See 15 U.S.C. 7246 (referring separately to "disgorgement" and "civil penalty"); 15 U.S.C. 80a-9(e) (same); see also pp. 44-45, *infra* (noting various statutory references to disgorgement in SEC actions).[7] If Congress had viewed disgorgement as

---

[6] Petitioner states (Br. 25) that, in a provision outside the securities laws and not relevant to this case, authorization for disgorgement appears in a subsection in a section on "civil penalties." But disgorgement—along with restitution, which is plainly not a penalty—is described in that provision as an "[e]quitable remed[y]." Pub. L. No. 111-203, Tit. VII, § 744, 124 Stat. 1735 (2010); see 7 U.S.C. 13a-1(d)(3).

[7] Petitioner regards 15 U.S.C. 78u-6(b)(1), which allows whistleblowers to receive an amount "equal to" (rather than derived from) money collected from the defendant in some SEC cases, as evi-

punitive, it might have concluded that civil-penalty provisions were not necessary in the first place.

3. Petitioner's Arguments That Disgorgement Is A "Penalty" Under Section 2462 Lack Merit

a. Petitioner's primary argument is that *every* non-compensatory remedy is a penalty. That understanding is flawed.

i. Petitioner rests his argument largely on *Kelly* v. *Robinson*, 479 U.S. 36 (1986), in which this Court interpreted a Bankruptcy Code provision enacted in 1978 that makes nondischargeable a debt that is for a "fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss." 11 U.S.C. 523(a)(7); see Pet. Br. 28. This Court held that "any condition a state criminal court imposes as part of a criminal sentence," including a restitution order, is nondischargeable under that provision. *Kelly*, 479 U.S. at 50.

That conclusion is not relevant to interpreting the word "penalty" in Section 2462. In *Kelly*, the Court considered "the language of" the bankruptcy provision "in light of" considerations specific to bankruptcy law and to the status of the restitution order as part of a state-court criminal judgment. 479 U.S. at 43-44. The Court emphasized that courts had traditionally "refused to allow a discharge in bankruptcy to affect the judgment of a state criminal court," *id.* at 45; noted that "Congress enacted the Code in 1978 against the

---

dence that Congress views "penalties" and "disgorgement" as interchangeable. Br. 28. Section 78u-6(b)(1) lists those remedies separately, and otherwise expresses no view about the relationship between them.

background of [that] established judicial exception," *id.* at 46; and stated that "[o]ur interpretation * * * must reflect * * * a deep conviction that federal bankruptcy courts should not invalidate the results of state criminal proceedings," which have punitive goals and involve "an important aspect of the sovereignty retained by the States," *id.* at 47; see *id.* at 49, 51. None of those considerations is implicated here.

Petitioner also invokes what he describes (Br. 29) as a "long line of cases establishing that * * * non-compensatory remedies are 'penalties.'" But those decisions establish only that a compensatory remedy is *not* a penalty because it is not punitive. In *Brady* v. *Daly*, 175 U.S. 148 (1899), for example, the Court ruled that a suit seeking "damages" under a copyright statute was not "an action to recover for a forfeiture or penalty" because the copyright statute did not "speak of punishment or penalties" but instead used language "provid[ing] for the recovery * * * of full compensation from the wrongdoer." *Id.* at 152, 154; see *id.* at 155. In *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U.S. 390 (1906), the Court ruled that the limitations period under a predecessor to Section 2462 did not apply to an injured party's suit for damages in an antitrust case. See *id.* at 395-397. And in *Porter* v. *Warner Holding Co.*, 328 U.S. 395 (1946), the Court stated that the equitable "disgorgement" remedy sought by the government in that case, which would have resulted in the defendant refunding money to injured parties, "differs greatly from the damages and penalties which may be awarded" under a separate provision of the relevant statute.

Id. at 402; see *id.* at 396-397.[8] But the fact that a compensatory remedy is *not* a penalty does not mean that every non-compensatory remedy *is* a penalty. Whether a penalty exists depends on whether the remedy is "punitive," *Meeker*, 236 U.S. at 423, not (or not exclusively) on whether it is compensatory.

ii. In any event, disgorgement in SEC actions is often used to compensate victims of securities-law violations. See pp. 19-22, *supra*. Petitioner's approach logically implies that disgorgement is not a penalty when the district court orders the funds distributed to victims, but is a penalty when the court finds such distribution infeasible. That approach would substantially complicate the application of Section 2462 to particular cases, and it would give defendants who victimize large numbers of small investors (as petitioner did), thus making distribution of any disgorgement amount more difficult, a greater chance of keeping unlawful gains. It would also imply that even amounts that Congress has labeled "civil penalties" could sometimes be considered non-penal for statute-of-limitations purposes, because those penalties may likewise be distributed to injured parties. See 15 U.S.C. 7246(a).

---

[8] Petitioner reads *Porter* to hold that the remedy available to the government under Section 205(e) of the relevant statute was a penalty "precisely because it went to the Treasury." Br. 31. *Porter* says no such thing. The Court's passing references to the government's remedy under Section 205(e) as "damages in the nature of penalties," see 328 U.S. at 401-402, were most likely due to Section 205(e)'s provision for recovery that far exceeded the amount of the relevant "overcharge" (by trebling that amount and adding a fine). See *id.* at 406 n.9 (Rutledge, J., dissenting); see also *id.* at 406 (describing statutory recovery by injured person as "damages with penalty").

b. Petitioner suggests (Br. 23) that any remedy with a deterrent purpose or effect is a "penalty" under Section 2462. But "provisions for damages are, of course, deterrents of default," *Priebe & Sons, Inc.* v. *United States*, 332 U.S. 407, 413 (1947), and "[t]he historic injunctive process was designed to deter, not to punish," *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329 (1944). Thus, even an "obvious deterrent purpose" is not alone sufficient to "mark[ ]" a remedy "as a form of punishment," although it may be relevant to that determination. *Department of Revenue* v. *Kurth Ranch*, 511 U.S. 767, 780 (1994); cf. *Hudson* v. *United States*, 522 U.S. 93, 102 (1997) (explaining that a "test for determining whether a particular sanction is 'punitive'" for double jeopardy purposes that turns on whether it is "'solely' remedial (*i.e.*, entirely nondeterrent)" has "proved unworkable"); *United States* v. *Ursery*, 518 U.S. 267, 291-292 (1996); *Coghlan* v. *NTSB*, 470 F.3d 1300, 1305-1307 (11th Cir. 2006).

c. Petitioner also argues (Br. 32-35) that his view of disgorgement is supported by a tradition of guarding against the "danger" of government-inflicted penalties. But tracing ancient English provisions specifically relating to penal laws (*e.g.*, Br. 33-34) does not help to decide whether disgorgement is punitive in the relevant sense. That is particularly true given that the "amercements" to which petitioner points were "criminal sanction[s]," *Solem* v. *Helm*, 463 U.S. 277, 284 & n.8 (1983), and the restrictions ultimately placed on those sanctions under English law—requiring the kind of proportionality embodied in the Constitution's Excessive Fines Clause—applied only in criminal cases, see *Browning-Ferris Indus. of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 272 (1989).

This case implicates another principle that would have been well known to the drafters of the 1839 statute: the rule that a sovereign is not subject to a limitations period unless it expressly consents to one. See, *e.g.*, *BP Am. Prod. Co.* v. *Burton*, 549 U.S. 84, 95-96 (2006) (tracing that canon to "the traditional rule *quod nullum tempus occurrit regi*—time does not run against the King"); *United States* v. *Thompson*, 98 U.S. 486, 489-490 (1879); *United States* v. *Hoar*, 26 F. Cas. 329, 329-330 (D. Mass. 1821) (Story, J.). If Congress chooses to impose time limits when the government pursues penal remedies, but not when it pursues disgorgement, that is Congress's prerogative. That choice makes particular sense with respect to SEC actions, where no special "danger" exists because disgorgement amounts in such actions are often directed away from "the government's coffers." Pet. Br. 32.

Petitioner suggests (Br. 35-37) that courts in some SEC cases have conceived of disgorgement so broadly as to go beyond the core purpose of preventing unjust enrichment. The disgorgement order in this case does not implicate that concern, but rather involves money that petitioner stole from small investors and directed in ways that benefited him.[9] More generally, defendants are protected by the various equitable limitations that courts have placed on the use and scope of the

---

[9] Petitioner's suggestion that the disgorgement amount in this case includes money taken by other people is wrong. Petitioner *used* the stolen money not only by funding his own extravagant lifestyle but also by directing money to the Advisers, which he owned and controlled, to pay expenses for which he would otherwise have been responsible. Cf. *Salman* v. *United States*, 137 S. Ct. 420 (2016).

disgorgement remedy. See, *e.g.*, *SEC* v. *Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1104-1105 (2d Cir. 1972) (order to disgorge income earned on ill-gotten gains was punitive and therefore outside the court's equity powers); *First City*, 890 F.2d at 1231 (disgorgement may be ordered only in an amount "causally connected" to the wrongdoing). The fact that "the burden of uncertainty in calculating ill-gotten gains falls on the wrongdoers who create that uncertainty," *Zacharias*, 569 F.3d at 473 (citation omitted); see, *e.g.*, *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946), does not render disgorgement punitive.

d. Finally, petitioner contends that the government has taken inconsistent positions on whether disgorgement constitutes a penalty. But none of the positions to which petitioner points involved Section 2462, which must be interpreted in light of its specific language and context.

i. As petitioner explains (Br. 37-38), the government argued in the 1990s that disgorgement is a "fine, penalty, or forfeiture" under 11 U.S.C. 523(a)(7). As noted above, however, interpretation of that Bankruptcy Code provision is governed by principles that have no application here. See pp. 25-26, *supra*.[10] And in any event, in 2002, Congress amended Section 523 by adding to the list of non-dischargeable debts any debt that is for "the violation of any of the Federal securities laws" and results from "any court or administrative order for any damages, fine, penalty, citation,

---

[10] One of the bankruptcy decisions on which petitioner relies (Br. 37)—*In re Telsey*, 144 B.R. 563 (Bankr. S.D. Fla. 1992)—has been vacated at the SEC's request. See SEC Reply Br., *SEC* v. *Graham*, No. 14-13562 (11th Cir.), Addendum 5-9; see also *Lorin*, 869 F. Supp. at 1124-1125 (distinguishing *Telsey*).

restitutionary payment, disgorgement payment, * * * or other payment owed by the debtor." 11 U.S.C. 523(a)(19); see Sarbanes-Oxley Act § 803(3), 116 Stat. 801. That provision treats "disgorgement" in securities cases as separate from both "fine[s]" and "penalt[ies]," while making clear that debts arising from disgorgement orders are non-dischargeable.

ii. Petitioner next asserts (Br. 38) that the government has treated securities-law disgorgement orders as falling within the scope of a tax provision that prohibits deductions for "any fine or similar penalty paid to a government for the violation of any law." 26 U.S.C. 162(f). He points only to a non-precedential 2016 IRS "advice" memorandum. Thomas D. Moffitt, Office of Associate Chief Counsel, IRS, Memorandum No. 201619008, at 1 (Jan. 29, 2016), https://www.irs.gov/pub/irs-wd/201619008.pdf (Memorandum); see 26 U.S.C. 6110. That memorandum takes the position that disgorgement may or may not qualify as a "fine or similar penalty" under the tax law depending "on the facts and circumstances of a particular case." *Id.* at 8.

Nothing in that determination contradicts the conclusion that disgorgement in securities cases is not a "penalty" within the meaning of Section 2462. Section 2462 traces back to the early 1800s; Section 162(f) was enacted in 1969. See Pub. L. No. 91-172, Tit. IX, § 902(a), 83 Stat. 710. While the two provisions both use the words "fine" and "penalty," they otherwise have different language, and they have wholly different purposes. In addition, under the tax law a payment can qualify as a "fine or similar penalty" even if it does not "punish[]" but merely deters. Memoran-

dum 6-7 (citation omitted). The meaning of "penalty" under Section 2462 is very different.

iii. Petitioner also suggests that the government has taken an inconsistent position by characterizing criminal forfeiture of criminal proceeds as "monetary punishment." Br. 39; see *id.* at 25-26. Petitioner is mistaken. The brief in opposition on which he relies merely echoes this Court's conclusion that an "*in personam* criminal forfeiture" that includes criminal proceeds "is clearly a form of monetary punishment." *Alexander* v. *United States*, 509 U.S. 544, 558 (1993). The government's use of the word "punishment" to describe a forfeiture imposed as part of the sentence for a crime has no bearing on whether disgorgement in an SEC civil suit is a "penalty" under Section 2462. Cf. *Pasquantino* v. *United States*, 544 U.S. 349, 365 (2005) (stating that "[t]he purpose of awarding restitution in" a criminal prosecution is "to mete out appropriate criminal punishment for [the defendant's] conduct"); *Kelly*, 479 U.S. at 53 (construing 11 U.S.C. 523(a)(7) in light of the fact that "criminal proceedings focus on the State's interests in rehabilitation and punishment, rather than the victim's desire for compensation").

B. Disgorgement Is Not A "Forfeiture" Under Section 2462

1. Like "penalty," the word "forfeiture" can have different meanings in different contexts. See, *e.g.*, *United States* v. *Mann*, 26 F. Cas. 1153, 1154 (C.C.D.N.H. 1812) (No. 15,718) (Story, J.); *Black's Law Dictionary* 883-884 (1st ed. 1891). As with "penalty," however, this Court has already interpreted "forfeiture" as it is used in the provision at issue here, as part of a limited list of remedies to which the five-

year statute of limitations applies. For purposes of Section 2462, "forfeiture," too, means a punishment. As this Court explained in *Meeker*, *supra*, interpreting a predecessor to Section 2462, "[t]he words 'penalty or forfeiture' in this section refer to something imposed in a punitive way for an infraction of a public law." 236 U.S. at 423; cf. *Gabelli*, 133 S. Ct. at 1223.

That interpretation is consistent with pertinent definitions of "forfeiture." In St. George Tucker's early American edition of Blackstone, published in 1803, "forfeiture" was described as "a punishment for some crime or misdemeanor[] in the party forfeiting." 3 St. George Tucker, *Blackstone's Commentaries with Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia* 420 (1803); see *ibid.* (stating that "goods and chattels may be acquired and lost * * * by forfeiture" as a punishment and describing fines as "forfeitures"); *id.* at 267 (forfeiture of property is "a punishment annexed by law to some illegal act or negligence, in the owner of lands, tenements, or hereditaments"). Other nineteenth-century definitions were similar. See, *e.g.*, Samuel Johnson et al., *Johnson's English Dictionary* 400 (1834) (defining the noun "forfeit" as "[s]omething lost by the commission of a crime; a fine; a mulct," the adjective "forfeit" as "[l]iable to penal seizure; alienated by a crime," and the noun "forfeiture" as "[t]he thing forfeited; a mulct, a fine") (cited in Pet. Br. 13); *Black's Law Dictionary* 507-508 (1st ed. 1891); see also *Reisinger*, 128 U.S. at 402 ("the words 'penalty,' 'liability,' and 'forfeiture' * * * have been used by the great masters of crown law and the elementary writers as synonymous with the word 'punishment'").

That interpretation is also consistent with the way that the terms "fine, penalty, or forfeiture" are used together in Section 2462. See Pet. App. 15a; *McDonnell* v. *United States*, 136 S. Ct. 2355, 2368 (2016) (explaining that "the familiar interpretive canon *noscitur a sociis*," under which "a word is known by the company it keeps," is "often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress") (citation and internal quotation marks omitted). As explained above, a "penalty" is inherently punitive. So too is a "fine," which can be assessed as a punishment for a violation of the law regardless of the profit made, the harm caused, or a defendant's particular circumstances. See *Browning-Ferris*, 492 U.S. at 265 ("the word 'fine' was understood to mean a payment to a sovereign as punishment for some offense"). Because the term "forfeiture" is readily—indeed, most naturally—understood to refer to a punitive measure, see, *e.g.*, *Austin* v. *United States*, 509 U.S. 602, 612-614, 618, 621 (1993) ("We conclude * * * that forfeiture generally and statutory *in rem* forfeiture in particular historically have been understood, at least in part, as punishment."); *Peisch* v. *Ware*, 8 U.S. (4 Cranch) 347, 364 (1808) (forfeiture of goods under customs statute "punishes"), it should bear that meaning when joined in a list with two other terms that are traditionally associated with punishment. For purposes of Section 2462, disgorgement therefore is not a "forfeiture" for the same reasons it is not a "penalty."

2. When Congress enacted the 1839 provision that ultimately became Section 2462, the word "forfeiture" would have been understood (as the court of appeals

correctly explained, see Pet. App. 14a) to refer to *in rem* forfeitures that "punished" guilty property. It also would have been understood as a synonym for a fine. In no event would the 1839 Congress—or the 1948 Congress that enacted the current version of the statute-of-limitation provision—have envisioned that "forfeiture" could cover a personal judgment for disgorgement of ill-gotten gains.

a. "Three kinds of forfeiture were established in England at the time the Eighth Amendment was ratified in the United States: deodand, forfeiture upon conviction for a felony or treason, and statutory forfeiture." *Austin*, 509 U.S. at 611.[11] Only the third kind "took hold" in this country: *in rem* "statutory forfeitures of offending objects used in violation of the customs and revenue laws." *Id.* at 612-613 (citation omitted); see, *e.g.*, *United States* v. *92 Buena Vista Ave.*, 507 U.S. 111, 118-123 (1993) (opinion of Stevens, J.).

An 1839 statutory reference to "forfeiture" would have been understood as referring to such *in rem* forfeiture. Indeed, Justice Story observed in *United States* v. *Mann*, 26 F. Cas. 1153 (C.C.D.N.H. 1812) (No. 15,718), that statutes "frequently" use "the word 'forfeiture'" to mean "forfeitures in rem." *Id.* at 1154.

That kind of forfeiture is punitive in the relevant sense. It was conceived of as punishing the property itself, regardless of the guilt or innocence of the property's owner. See *Austin*, 509 U.S. at 615-616 (collecting cases); *United States* v. *Bajakajian*, 524 U.S.

---

[11] "At common law the value of an inanimate object directly or indirectly causing the accidental death of a King's subject was forfeited to the Crown as a deodand." *Austin*, 509 U.S. at 611 (citation omitted).

321, 329-330 (1998). It also had the practical effect of punishing the owner for any negligence he may have shown in allowing his property to become associated with illicit activity. See *Austin*, 509 U.S. at 616-618; see also *id.* at 611 (explaining that all three kinds of forfeiture known to the Founders were "understood, at least in part, as imposing punishment"); *id.* at 612-614 (stating that *in rem* forfeiture was considered "penal" by Blackstone, and that "the First Congress viewed forfeiture as punishment"). Cf. *Bajakajian*, 524 U.S. at 330-331 (stating that "traditional civil *in rem* forfeitures * * * were historically considered nonpunitive" as to the owner of the property, although punitive as to the property itself).[12]

In 1839, the term "forfeiture" also could have been understood to mean a fine—a fixed "pecuniary mulct." *Mann*, 26 F. Cas. at 1154; see, *e.g.*, *Austin*, 509 U.S. at 614 & n.7 (noting that "forfeit" was the word used for "fine" in a 1789 statute, and that "[d]ictionaries of the time confirm that 'fine' was understood to include 'forfeiture' and vice versa"); *Black's Law Dictionary* 508 (1st ed. 1891) (forfeiture involves a "loss of land,"

---

[12] Petitioner quotes *Taylor* v. *United States*, 44 U.S. (3 How.) 197, 210 (1845), as stating that seizure of offending goods under the customs laws was "truly . . . remedial." Br. 14. But *Taylor* also states that, "[i]n one sense, every law imposing a penalty or forfeiture may be deemed a penal law." 44 U.S. (3 How.) at 210. Compare *Austin*, 509 U.S. at 612-622 (discussing Excessive Fines Clause), with *Ursery*, 518 U.S. at 270-271, 274 (discussing Double Jeopardy Clause); see *id.* at 295 (Kennedy, J., concurring) ("Forfeiture, then, punishes an owner by taking property involved in a crime, and it may happen that the owner is also the wrongdoer charged with a criminal offense. But the forfeiture is not a second *in personam* punishment for the offense, which is all the Double Jeopardy Clause prohibits.").

"loss of goods or chattels," or a fine); 1 *Webster's Dictionary* 86 (1828) (defining the noun "forfeiture" as "an estate forfeited; a fine or mulct. The prince enriched his treasury by fines and *forfeitures*.") (cited in Pet. Br. 13). A fine is itself a penalty, and "fine" independently appears in the current version of the limitations provision. See 28 U.S.C. 2462.[13]

Disgorgement is very different from an *in rem* forfeiture or fine. Disgorgement does not punish either the defendant or his property; it does not extend beyond the amount of a defendant's unjust enrichment; it does not derive from admiralty law, customs law, or criminal law; and it is equitably and flexibly applied. Cf. *Gladding*, 58 U.S. (17 How.) at 453-455 (distinguishing between an accounting for profits and "forfeiture"). Accordingly, disgorgement is not a "forfeiture" within the meaning of Section 2462.[14]

b. Petitioner contends (Br. 12-13) that "forfeiture" in Section 2462 has a far broader meaning, covering "any order to turn over money to the government, as sovereign, as a result of a legal transgression." That sweeping definition does not withstand scrutiny. In any event, petitioner has not identified any form of historical forfeiture that resembled disgorgement.

---

[13] Petitioner points out (Br. 20) that 28 U.S.C. 2461, which dates from 1948, see 1947 House Report A190, refers separately to a "pecuniary forfeiture" and a "forfeiture of property." The term "pecuniary forfeiture" is readily understood to encompass a fine.

[14] Petitioner identifies (Br. 22) a few stray sentences in which courts have referred to disgorgement as a forfeiture, or vice-versa. Those passages simply reflect the colloquial meanings of those words, and in particular the loose sense that something given back or given up has been disgorged. They have no bearing on whether the disgorgement remedy in SEC actions falls within the scope of "forfeiture" in Section 2462.

Petitioner acknowledges (Br. 14-15) that "forfeiture" encompasses fines and *in rem* forfeitures (although he characterizes the latter as purely remedial). To justify his expansive definition of forfeiture, however, he includes two other categories as well. First, he contends (Br. 14) that "forfeiture" refers to "forfeiture of estate," *Austin*, 509 U.S. at 613, requiring criminals to give all their real and personal property to the sovereign. But since forfeiture of estate was outlawed in the United States from this country's inception (see Br. 14), it is unlikely that Section 2462 was intended to provide a statute of limitations that covered it.

Second, petitioner states (Br. 15) that "forfeiture" refers to early customs statutes requiring a party to "forfeit and pay" a sum that is a multiple of the value of goods unlawfully imported or sold. But the mere existence of the word "forfeit" in the statute does not make the amount in question a "forfeiture." This Court explained in *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537 (1943), that "[s]pecial consequence cannot be drawn from the use of the word 'forfeit'" since "[t]he words 'forfeit and pay' are wholly consistent with a civil action for damages," *id.* at 551 (citation omitted)—an action that petitioner would not describe as a forfeiture. See Pet. Br. 12-13; see also 60 N.Y. Jur. 2d *Forfeitures and Penalties* § 1 (2d ed. 2016) ("A statute that provides that upon its violation the offender 'forfeits' a certain sum of money prescribes, in reality, a penalty, rather than imposing a forfeiture, as that term is properly used.") (footnote omitted); see generally Walter Scott, *Lay of the Last Minstrel*, Canto VI, at 176 (5th ed. 1806) ("The wretch, concentrated all in self, * * * shall forfeit

fair renown."). The statutes to which petitioner refers are better understood as having imposed either penalties or a form of liquidated damages for the losses the government "accru[ed] from the evasion of customs duties." *Bajakajian*, 524 U.S. at 342. Indeed, in discussing those statutes this Court has referred to "payment of monetary penalties proportioned to the goods' value." *Id.* at 340; see *id.* at 341 (referring to payments as "forfeitures" with the word in quotation marks); *id.* at 345 (Kennedy, J., dissenting) (referring to a "six-century-long tradition of *in personam* customs fines equal to one, two, three, or even four times the value of the goods at issue").

Whether or not those remedies are "forfeiture[s]" within the meaning of Section 2462, petitioner does not claim to have identified any historic form of "forfeiture" equivalent to disgorgement. His only effort to compare disgorgement to some long-ago type of forfeiture (Br. 17-19) is to point to the statutes requiring defendants to pay multiples of some unlawful property's value. There is an obvious difference, however, between a remedy that is limited to a defendant's ill-gotten gains and a remedy defined as a fixed *multiple* of that amount. Provisions involving such multiples may be justified as penalties, or (at least in some instances) as reasonable liquidated damages. Unlike disgorgement, however, they are not equitable remedies analogous to restitution.

c. As petitioner recognizes (Br. 16), it was not until the 1970s that existing forfeiture provisions were expanded to allow for *in personam* criminal forfeiture and to cover "proceeds" of a crime, which include both the criminal's illicit gains and any profits earned on those gains. See, *e.g.*, 18 U.S.C. 1963(a)(3); 18 U.S.C.

981(a)(1)(C); see also *Bajakajian*, 524 U.S. at 332 & n.7 ("The First Congress [in 1790] explicitly rejected *in personam* forfeitures as punishments for federal crimes, and Congress reenacted this ban several times over the course of two centuries.") (citation omitted); *92 Buena Vista Ave.*, 507 U.S. at 121-123 & n.16 (opinion of Stevens, J.); Stefan D. Cassella, *Asset Forfeiture Law in the United States* § 25-4, at 900 (2d ed. 2013) (Cassella) (stating that forfeiture of proceeds is a "relatively recent innovation"). Thus, when Section 2462 and its predecessors were enacted, the word "forfeiture" would not have been understood to include a remedy like disgorgement, which makes a defendant personally liable for payment of the amount of the gains he realized through securities violations (but not for any profits realized from those gains).

It is true that, when Congress decided to strip certain criminals of the proceeds of their crimes, it called that measure a "forfeiture." That enabled the new sanction to be implemented using established forfeiture procedures, both in criminal cases as part of a sentence and in civil *in rem* proceedings.[15] But Congress's use of the term "forfeiture" in statutes that long postdate Section 2462 has no meaningful bearing on the proper interpretation of that statute or its predecessors. See Cassella § 2-1, at 28 ("laws and concepts that developed slowly * * * were greatly expanded in the last 20 years"); *id.* § 2-4, at 33 (changes in the 1970s to encompass proceeds were "entirely new" and "a dramatic expansion").

---

[15] Such forfeiture proceedings have their own statute of limitations separate from Section 2462. See, *e.g.*, 19 U.S.C. 1621 (statute of limitations governing civil forfeiture, which includes a discovery rule); 18 U.S.C. 981(d).

To be sure, Section 2462 is not limited to the "specific set of circumstances that may have precipitated its passage." *United States* v. *Rodgers*, 466 U.S. 475, 480 (1984) (cited in Pet. Br. 17). Section 2462 applies to government claims for fines, penalties, or forfeitures for violating newly enacted statutory prohibitions, just as it applies to financial punishments for violating longstanding legal norms. But the *term* "forfeiture" in Section 2462 retains the meaning it had when that provision was enacted, and disgorgement would not have been considered a "forfeiture" at that time. Petitioner has not challenged (and did not challenge below) the district court's authority to order disgorgement in securities-law cases as "an equitable adjunct to an injunction decree," *Porter*, 328 U.S. at 399, or a "restorative injunction," *United States* v. *Telluride Co.*, 146 F.3d 1241, 1247 (10th Cir. 1998); see 15 U.S.C. 78u(d)(1) and (5). In any event, disgorgement's status as an equitable remedy reinforces the conclusion that it is neither a penalty nor a forfeiture within the meaning of Section 2462.

C. Extending Section 2462 To Cover Disgorgement Is Inconsistent With The Purposes Of Statutes Of Limitations And Would Have Harmful Consequences

1. In stressing "the importance of time limits on penalty actions," this Court in *Gabelli* relied on authority "stating that it 'would be utterly repugnant to the genius of our laws' if actions for penalties could 'be brought at any distance of time.'" 133 S. Ct. at 1223 (quoting *Adams* v. *Woods*, 6 U.S. (2 Cranch) 336, 342 (1805)). The same concern underlies Congress's enactment of statutes of limitations for all but the most serious federal crimes. See, *e.g.*, 18 U.S.C. 3282.

By contrast, "there are few credible arguments that a defendant should be permitted to retain his or her ill-gotten gains, regardless of how much time has elapsed since the misconduct in question." Steven R. Glaser, *Statutes of Limitations for Equitable and Remedial Relief in SEC Enforcement Actions*, 4 Harv. Bus. L. Rev. 129, 153 (2014). No principle of fairness gives a "robber[]" an absolute right to keep his "loot" if only his wrongdoing remains hidden long enough. *Luis* v. *United States*, 136 S. Ct. 1083, 1090 (2016); see generally Jeremy Bentham, *The Rationale of Punishment* 432 (1830) ("In crimes the object of which is pecuniary profit, prescription [*i.e.*, a limitations period] ought not in any case to operate so as to protect the delinquent in the enjoyment of his ill-gotten acquisition.").

The proper comparison therefore is not between disgorgement and criminal penalties, see Pet. Br. 43, but between disgorgement and other equitable remedies granted in government civil suits. Such remedies often are subject to no statute of limitations at all. See generally *E.I. Dupont De Nemours & Co.* v. *Davis*, 264 U.S. 456, 462 (1924) ("[A]n action on behalf of the United States in its governmental capacity * * * is subject to no time limitation, in the absence of congressional enactment clearly imposing it."); *Holmberg* v. *Armbrecht*, 327 U.S. 392, 396-397 (1946); *SEC* v. *Rind*, 991 F.2d 1486, 1491 (9th Cir.) (collecting examples), cert. denied, 510 U.S. 963 (1993); Catherine E. Maxson, Note, *The Applicability of Section 2462's Statute of Limitations to SEC Enforcement Suits in Light of the Remedies Act of 1990*, 94 Mich. L. Rev. 512, 513-514 (1995) ("Despite the existence of the general statutes of limitations in title 28, many gov-

ernment suits remain unrestricted by any time bar."); see also 28 U.S.C. 1658 (Supp. II 1990). In *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355 (1977), for example, this Court held that no statute of limitations applied to EEOC enforcement actions under Title VII. See *id.* at 367-373.

To be sure, even in the absence of a statutory time bar, a court may take into account the passage of time since the underlying violation in determining whether particular equitable relief is appropriate. Courts that have correctly found disgorgement to be outside the scope of Section 2462 have recognized that "[a] court can and should consider the remoteness of the defendant's past violations in deciding whether to grant the requested equitable relief." *Rind*, 991 F.2d at 1492; see, *e.g.*, *SEC* v. *Wyly*, 56 F. Supp. 3d 394, 433 (S.D.N.Y. 2014); see generally *Occidental*, 432 U.S. at 373 (holding that a court's discretionary power "'to locate "a just result" in light of the circumstances peculiar to the case'" can be exercised "when the EEOC is the plaintiff") (quoting *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 424 (1975)). But the existence of that equitable discretion does not support petitioner's contention that the district court was categorically barred from ordering disgorgement of funds that petitioner wrongfully obtained more than five years before this suit was filed.

2. a. The approach we advocate has been rejected only by the Eleventh Circuit, which in 2016 became the first court of appeals to rule that Section 2462 applies when the SEC seeks disgorgement. See *SEC* v. *Graham*, 823 F.3d 1357 (11th Cir. 2016).[16] All the

---

[16] Petitioner does not adopt or defend *Graham*'s specific reasoning. See 823 F.3d at 1363-1364.

courts of appeals that had previously addressed the question had found Section 2462 inapplicable to that remedy. See, *e.g.*, *Riordan* v. *SEC*, 627 F.3d 1230, 1234-1235 & n.1 (D.C. Cir. 2010); *SEC* v. *Tambone*, 550 F.3d 106, 148 (1st Cir. 2008), reh'g en banc granted and opinion withdrawn, 573 F.3d 54 (1st Cir. 2009), reinstated in relevant part, 597 F.3d 436 (1st Cir. 2010); *Johnson* v. *SEC*, 87 F.3d 484, 491-492 (D.C. Cir. 1996); see generally *Rind*, 991 F.2d at 1490-1493; Mitchell A. Lowenthal et al., Special Project, *Time Bars in Specialized Federal Common Law: Federal Rights of Action and State Statutes of Limitations*, 65 Cornell L. Rev. 1011, 1023 n.65 (1980).

For nearly half a century, then, courts have viewed disgorgement as a permissible remedy in SEC enforcement actions without regard to any statute of limitations. During that period, Congress has enacted statutory provisions that assume the availability of a disgorgement remedy in SEC enforcement suits. See, *e.g.*, Pub. L. No. 104-67, § 103(b)(2), 109 Stat. 756 (1995) (stating that funds may be "disgorged as the result of an action brought by the Commission in Federal court" and placing a restriction on how those funds may be "distributed" to "private parties") (codified at 15 U.S.C. 78u(d)(4)); Pub. L. No. 100-704, § 5(b)(2), 102 Stat. 4681 (1988) (stating that defendant in insider-trading case can offset "the amounts * * * that such person may be required to disgorge, pursuant to a court order obtained at the instance of the Commission," against a damages award) (codified at 15 U.S.C. 78t-1(b)(2)); Pub. L. No. 107-204, § 308(c)(1), 116 Stat. 785 (2002) (calling for study of "enforcement actions by the Commission * * * that have included proceedings to obtain * * * disgorgements to identi-

fy areas where such proceedings may be utilized to efficiently, effectively, and fairly provide restitution for injured investors") (codified at 15 U.S.C. 7246(c)(1)); see also 1990 House Report 17. And Congress has placed time limits on other types of relief sought by the SEC, see, *e.g.*, 15 U.S.C. 78u-1(d)(5) (provision enacted in 1988 giving SEC five years from transaction to seek civil penalties for insider trading and stating that the limitation "shall not be construed to bar or limit in any manner any action by the Commission * * * under any other provision of this chapter"), as well as on securities actions brought by private parties, see 28 U.S.C. 1658(b) (provision enacted in 2002 limiting time to assert "private right of action" for certain claims "concerning the securities laws"). But Congress has not acted to impose any time restrictions on disgorgement, or on SEC enforcement actions more generally.

b. Petitioner has not shown that the prevailing approach to disgorgement has encouraged the SEC to delay filing suit or has unduly impaired defendants' ability to resist disgorgement claims. Because the Commission bears the burden of proof in securities-law enforcement actions, including the burden of establishing a causal connection between a violation and a disgorgement amount, any dulling of memories or loss of evidence is more likely to impede than to assist the SEC's litigation efforts. Cf. *Petrella* v. *Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1976-1977 (2014). The SEC thus has strong incentives to ferret out fraud and other wrongdoing as quickly as possible, despite its limited resources. See *Rind*, 991 F.2d at 1492 ("[S]ecurities fraud may involve multiple parties and transactions of mind-boggling complexity. Mar-

ket manipulation is notoriously hard to detect."). Those incentives have been strengthened by *Gabelli*, under which the SEC must bring suit within five years of the relevant misconduct to obtain statutory penalties. See *Gabelli*, 133 S. Ct. at 1223-1224.[17]

Adopting petitioner's proposed construction of Section 2462, moreover, would not give any defendant the "right to be free of" certain "claims." *Order of R.R. Telegraphers* v. *Railway Express Agency*, 321 U.S. 342, 349 (1944). Even if the passage of time after a defendant's defalcations barred the SEC from obtaining disgorgement (as well as penalties), the agency could still bring securities-law claims like the ones in

---

[17] In fiscal year 2015, for example, the average time between the start of an SEC investigation and the commencement of an SEC enforcement action was 24 months. See U.S. SEC, *FY 2015 Annual Performance Report & FY 2017 Annual Performance Plan* 37, https://www.sec.gov/about/reports/sec-fy2015-fy2017-annual-performance.pdf (last visited Mar. 26, 2017). Petitioner suggests (Br. 4-5) that *Gabelli*'s holding has resulted in the filing of stale claims by the SEC. But all the cases he cites, including this one, were filed before *Gabelli* was decided in 2013, and several of them were filed within five years after the defendants' bad acts concluded. See, *e.g.*, Compl., *SEC* v. *Wyly*, *supra*, No. 10-cv-5760 (filed July 29, 2010); Compl., *SEC* v. *Crawford*, No. 11-cv-3656 (D. Minn.) (filed Dec. 21, 2011). Indeed, petitioner and his amici point to very few cases in which the SEC has brought enforcement actions that would be barred by Section 2462, despite the prevailing understanding that Section 2462 does not apply to actions for disgorgement or injunctions. Petitioner also suggests (Br. 5) that the Commission has increasingly resorted to disgorgement to circumvent the time bar on penalties—but statistics do not bear out that assertion. See SEC, *Select SEC and Market Data* 2 (2005-2016) (Tbl. 1) (showing that the ratio of disgorgement to penalties has varied considerably over the past decade and that 2013, when *Gabelli* was decided, did not mark a point of steady increase in that ratio), https:// www.sec.gov/reports (last visited Mar. 26, 2017).

this case against that defendant and seek other forms of injunctive relief, such as an order prohibiting a defendant like petitioner from serving in the kind of fiduciary capacity that enabled him to swindle investors. See generally *United States* v. *Whited & Wheless Ltd.*, 246 U.S. 552, 561, 563-564 (1918). And in cases that involve a continuing course of conduct, the SEC could file suit up to five years after the end of the misconduct and, at a minimum, seek disgorgement (and penalties) for any bad acts that had taken place within that five-year look-back period.

Here, for example, the suit against petitioner was brought within five years after some (but not all) of his embezzlement. Petitioner therefore would have been subject to the suit, and to a disgorgement remedy, even under his own interpretation of Section 2462. Adoption of petitioner's proposed rule would simply allow him to keep a significant amount of the money that he stole from the investors who trusted him.

3. Adoption of petitioner's expansive reading of Section 2462 would increase the incentives for bad actors to violate the securities laws, since those incentives will be greater if the passage of time can shield illicit gains from the possibility of recoupment. See *Texas Gulf Sulphur*, 446 F.2d at 1308 ("It would severely defeat the purposes of the Act if a violator of Rule 10b-5 were allowed to retain the profits from his violation."); see also *SEC* v. *Wyly*, 117 F. Supp. 3d 381, 390 & n.40 (S.D.N.Y. 2015) (discussing the "pains" defendants took to "hide the extent of their control" over U.S. issuers to frustrate government investigation).[18] Petitioner's approach would also reduce the

---

[18] Courts have interpreted the tolling doctrine of fraudulent concealment narrowly in the wake of *Gabelli*'s rejection of the

likelihood that victims will be compensated through distribution of disgorged funds. See, *e.g.*, *SEC* v. *Graham*, 21 F. Supp. 3d 1300 (S.D. Fla. 2014) (applying Section 2462 to prevent disgorgement of $300 million from Ponzi scheme), aff'd in part, rev'd in part, and remanded, 823 F.3d 1357 (11th Cir. 2016). And the adverse practical consequences of construing Section 2462 to encompass disgorgement would not be confined to securities-law cases, since the government regularly seeks disgorgement in other contexts as well, under general statutory grants of authority to give equitable relief. See, *e.g.*, *United States* v. *Universal Mgmt. Servs., Inc.*, 191 F.3d 750, 760 (6th Cir. 1999) (Federal Food, Drug, and Cosmetic Act), cert. denied, 530 U.S. 1274 (2000); *FTC* v. *Gem Merch. Corp.*, 87 F.3d 466, 469 (11th Cir. 1996) (Federal Trade Commission Act).

4. Petitioner contends (Br. 40-41) that the dangers of government abuse are great if no limitations period applies to disgorgement. But because a disgorgement remedy simply divests the defendant of his illicit gains, it does not implicate the *Gabelli* Court's concern about punishing a defendant for long-ago violations. Petitioner asserts (Br. 41-42) that the absence of a statute of limitations "is especially troubling" because of "how the SEC enforces the law." But petitioner stole money while ostensibly acting as a fiduciary for investors; that conduct is and has long been obviously illegal.

Petitioner also contends (Br. 46) that the government's position is "capricious" because it treats dis-

---

discovery rule, finding that concealment is often part and parcel of the fraud itself. See *SEC* v. *Wyly*, 950 F. Supp. 2d 547, 556-558 (S.D.N.Y. 2013).

gorgement differently from other remedies. Congress has declined, however, to enact any statute of limitations under which the passage of time could bar an SEC enforcement action altogether. And Section 2462, the provision on which petitioner relies, is limited by its terms to specified remedies. There is nothing "capricious" about Congress's decision to limit the time within which the government can seek punitive sanctions, but not to limit the period for seeking an equitable remedy that simply divests the defendant of his illicit gains.

D. The Canon Of Narrow Construction Reinforces The Conclusion That Section 2462 Does Not Apply To Disgorgement

This Court has frequently applied the interpretive rule that "[s]tatutes of limitation sought to be applied to bar rights of the Government, must receive a strict construction in favor of the Government." *E.I. Dupont De Nemours*, 264 U.S. at 462; see, *e.g.*, *BP Am.*, 549 U.S. at 95-96 (narrow-construction rule "erased" any "doubts" about meaning of the limitations provision at issue). The narrow-construction canon is fully applicable here because the parties' dispute concerns the meaning of the terms "penalty" and "forfeiture" as they appear in Section 2462.

Petitioner asserts that the narrow-construction canon applies only "when [the government] sues to vindicate its own rights to money and property." Br. 46 (emphasis omitted). Petitioner cites no decision, however, that has announced such a limit on the scope of the interpretive rule. Nor would any such limit follow logically from the rationale for the canon itself, which rests on the government's sovereignty, not on the specific nature of its suit. See *BP Am.*, 549 U.S. at

95-96; *E.I. Dupont De Nemours*, 264 U.S. at 462; see, *e.g.*, *Badaracco* v. *Commissioner*, 464 U.S. 386, 390-391 (1984) (invoking the rule in case involving government collection of tax penalties, not just unpaid tax amounts).

Petitioner also relies on decisions construing statutes of limitations in circumstances that undoubtedly involved penalties. See Br. 47-48 (citing *Adams* v. *Woods*, 6 U.S. (2 Cranch) 336 (1805), and *United States* v. *Mayo*, 26 F. Cas. 1230 (C.C.D. Mass. 1813)). In *Adams*, the Court found no statutory ambiguity that would warrant the application of the narrow-construction canon. See 6 U.S. (2 Cranch) at 341. The Court also relied on the background understanding that actions for "penalties" are generally subject to *some* statute of limitations, see *id.* at 342, a premise that provides no assistance in determining what the statutory term "penalty" means. *Mayo* is similarly inapposite. That decision recited the same penalty-specific rationale as did *Adams*, see *Mayo*, 26 F. Cas. at 1231, and it turned on a choice among several potentially applicable limitations provisions. See *ibid.*

Finally, contrary to petitioner's suggestion (Br. 48), the government does not contend that Section 2462 is limited to forms of relief that are specifically identified as "fine[s], penalt[ies], or forfeiture[s]" in the statutes that authorize those remedies to be imposed. As explained above, courts have long viewed disgorgement awards as permissible exercises of the courts' statutory authority to enter injunctive relief in SEC enforcement suits. That derivation would not render Section 2462 inapplicable if the term "penalty" or "forfeiture" *clearly* encompassed disgorgement. At the very least, however, it is not clear that either term

encompasses a remedy that is not "intended to punish," *Gabelli*, 133 S. Ct. at 1223, but simply prevents the defendant from retaining his illicit gains. Under the narrow-construction canon, that is a sufficient ground for rejecting petitioner's interpretation of the contested statutory language.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General
MALCOLM L. STEWART
Deputy Solicitor General
ELAINE J. GOLDENBERG
Assistant to the Solicitor General

SANKET J. BULSARA
Acting General Counsel
MICHAEL A. CONLEY
Solicitor
JACOB H. STILLMAN
Senior Advisor to the Solicitor
HOPE HALL AUGUSTINI
DANIEL STAROSELSKY
Senior Litigation Counsels
SARAH R. PRINS
Senior Counsel
Securities and Exchange Commission

MARCH 2017

APPENDIX

1. 28 U.S.C. 2462 provides:

Time for commencing proceedings

Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

2. 15 U.S.C. 78u (2012 & Supp. III 2015) provides:

Investigations and actions

(a) Authority and discretion of Commission to investigate violations

(1) The Commission may, in its discretion, make such investigations as it deems necessary to determine whether any person has violated, is violating, or is about to violate any provision of this chapter, the rules or regulations thereunder, the rules of a national securities exchange or registered securities association of which such person is a member or a person associated, or, as to any act or practice, or omission to act, while associated with a member, formerly associated with a member, the rules of a registered clearing agency in which such person is a participant, or, as to any act or practice, or omission to act, while a participant, was a participant, the rules of the Public Company Accounting Oversight Board, of which such person is a regis-

tered public accounting firm, a person associated with such a firm, or, as to any act, practice, or omission to act, while associated with such firm, a person formerly associated with such a firm, or the rules of the Municipal Securities Rulemaking Board, and may require or permit any person to file with it a statement in writing, under oath or otherwise as the Commission shall determine, as to all the facts and circumstances concerning the matter to be investigated. The Commission is authorized in its discretion, to publish information concerning any such violations, and to investigate any facts, conditions, practices, or matters which it may deem necessary or proper to aid in the enforcement of such provisions, in the prescribing of rules and regulations under this chapter, or in securing information to serve as a basis for recommending further legislation concerning the matters to which this chapter relates.

(2) On request from a foreign securities authority, the Commission may provide assistance in accordance with this paragraph if the requesting authority states that the requesting authority is conducting an investigation which it deems necessary to determine whether any person has violated, is violating, or is about to violate any laws or rules relating to securities matters that the requesting authority administers or enforces. The Commission may, in its discretion, conduct such investigation as the Commission deems necessary to collect information and evidence pertinent to the request for assistance. Such assistance may be provided without regard to whether the facts stated in the request would also constitute a violation of the laws of the United States. In deciding whether to provide such assistance, the Commission shall consider whether (A) the requesting authority has agreed to provide reciprocal

assistance in securities matters to the Commission; and (B) compliance with the request would prejudice the public interest of the United States.

(b) Attendance of witnesses; production of records

For the purpose of any such investigation, or any other proceeding under this chapter, any member of the Commission or any officer designated by it is empowered to administer oaths and affirmations, subpena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records which the Commission deems relevant or material to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in the United States or any State at any designated place of hearing.

(c) Judicial enforcement of investigative power of Commission; refusal to obey subpena; criminal sanctions

In case of contumacy by, or refusal to obey a subpena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records. And such court may issue an order requiring such person to appear before the Commission or member or officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any

failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found. Any person who shall, without just cause, fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, and other records, if in his power so to do, in obedience to the subpena of the Commission, shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine of not more than $1,000 or to imprisonment for a term of not more than one year, or both.

(d) Injunction proceedings; authority of court to prohibit persons from serving as officers and directors; money penalties in civil actions

(1) Whenever it shall appear to the Commission that any person is engaged or is about to engage in acts or practices constituting a violation of any provision of this chapter, the rules or regulations thereunder, the rules of a national securities exchange or registered securities association of which such person is a member or a person associated with a member, the rules of a registered clearing agency in which such person is a participant, the rules of the Public Company Accounting Oversight Board, of which such person is a registered public accounting firm or a person associated with such a firm, or the rules of the Municipal Securities Rulemaking Board, it may in its discretion bring an action in the proper district court of the United States, the United States District Court for the District of Columbia, or the United States courts of any territory or other place subject to the jurisdiction of the United

States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices as may constitute a violation of any provision of this chapter or the rules or regulations thereunder to the Attorney General, who may, in his discretion, institute the necessary criminal proceedings under this chapter.

(2) AUTHORITY OF COURT TO PROHIBIT PERSONS FROM SERVING AS OFFICERS AND DIRECTORS.—In any proceeding under paragraph (1) of this subsection, the court may prohibit, conditionally or unconditionally, and permanently or for such period of time as it shall determine, any person who violated section 78j(b) of this title or the rules or regulations thereunder from acting as an officer or director of any issuer that has a class of securities registered pursuant to section 781 of this title or that is required to file reports pursuant to section 78*o*(d) of this title if the person's conduct demonstrates unfitness to serve as an officer or director of any such issuer.

(3) MONEY PENALTIES IN CIVIL ACTIONS.—

(A) AUTHORITY OF COMMISSION.—Whenever it shall appear to the Commission that any person has violated any provision of this chapter, the rules or regulations thereunder, or a cease-and-desist order entered by the Commission pursuant to section 78u-3 of this title, other than by committing a violation subject to a penalty pursuant to section 78u-1 of this title, the Commission may bring an action in a United States district court to seek, and the court shall have jurisdiction to impose, upon a proper

showing, a civil penalty to be paid by the person who committed such violation.

(B) AMOUNT OF PENALTY.—

(i) FIRST TIER.—The amount of the penalty shall be determined by the court in light of the facts and circumstances. For each violation, the amount of the penalty shall not exceed the greater of (I) $5,000 for a natural person or $50,000 for any other person, or (II) the gross amount of pecuniary gain to such defendant as a result of the violation.

(ii) SECOND TIER.—Notwithstanding clause (i), the amount of penalty for each such violation shall not exceed the greater of (I) $50,000 for a natural person or $250,000 for any other person, or (II) the gross amount of pecuniary gain to such defendant as a result of the violation, if the violation described in subparagraph (A) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement.

(iii) THIRD TIER.—Notwithstanding clauses (i) and (ii), the amount of penalty for each such violation shall not exceed the greater of (I) $100,000 for a natural person or $500,000 for any other person, or (II) the gross amount of pecuniary gain to such defendant as a result of the violation, if—

(aa) the violation described in subparagraph (A) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; and

(bb) such violation directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons.

(C) PROCEDURES FOR COLLECTION.—

(i) PAYMENT OF PENALTY TO TREASURY.—A penalty imposed under this section shall be payable into the Treasury of the United States, except as otherwise provided in section 7246 of this title and section 78u-6 of this title.

(ii) COLLECTION OF PENALTIES.—If a person upon whom such a penalty is imposed shall fail to pay such penalty within the time prescribed in the court's order, the Commission may refer the matter to the Attorney General who shall recover such penalty by action in the appropriate United States district court.

(iii) REMEDY NOT EXCLUSIVE.—The actions authorized by this paragraph may be brought in addition to any other action that the Commission or the Attorney General is entitled to bring.

(iv) JURISDICTION AND VENUE.—For purposes of section 78aa of this title, actions under this paragraph shall be actions to enforce a liability or a duty created by this chapter.

(D) SPECIAL PROVISIONS RELATING TO A VIOLATION OF A CEASE-AND-DESIST ORDER.—In an action to enforce a cease-and-desist order entered by the Commission pursuant to section 78u-3 of this title, each separate violation of such order shall be a separate offense, except that in the case of a violation through a continuing failure to comply with

the order, each day of the failure to comply shall be deemed a separate offense.

(4) PROHIBITION OF ATTORNEYS' FEES PAID FROM COMMISSION DISGORGEMENT FUNDS.—Except as otherwise ordered by the court upon motion by the Commission, or, in the case of an administrative action, as otherwise ordered by the Commission, funds disgorged as the result of an action brought by the Commission in Federal court, or as a result of any Commission administrative action, shall not be distributed as payment for attorneys' fees or expenses incurred by private parties seeking distribution of the disgorged funds.

(5) EQUITABLE RELIEF.—In any action or proceeding brought or instituted by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors.

(6) AUTHORITY OF A COURT TO PROHIBIT PERSONS FROM PARTICIPATING IN AN OFFERING OF PENNY STOCK.—

(A) IN GENERAL.—In any proceeding under paragraph (1) against any person participating in, or, at the time of the alleged misconduct who was participating in, an offering of penny stock, the court may prohibit that person from participating in an offering of penny stock, conditionally or unconditionally, and permanently or for such period of time as the court shall determine.

(B) DEFINITION.—For purposes of this paragraph, the term "person participating in an offer-

ing of penny stock" includes any person engaging in activities with a broker, dealer, or issuer for purposes of issuing, trading, or inducing or attempting to induce the purchase or sale of, any penny stock. The Commission may, by rule or regulation, define such term to include other activities, and may, by rule, regulation, or order, exempt any person or class of persons, in whole or in part, conditionally or unconditionally, from inclusion in such term.

(e) Mandamus

Upon application of the Commission the district courts of the United States and the United States courts of any territory or other place subject to the jurisdiction of the United States shall have jurisdiction to issue writs of mandamus, injunctions, and orders commanding (1) any person to comply with the provisions of this chapter, the rules, regulations, and orders thereunder, the rules of a national securities exchange or registered securities association of which such person is a member or person associated with a member, the rules of a registered clearing agency in which such person is a participant, the rules of the Public Company Accounting Oversight Board, of which such person is a registered public accounting firm or a person associated with such a firm, the rules of the Municipal Securities Rulemaking Board, or any undertaking contained in a registration statement as provided in subsection (d) of section 78*o* of this title, (2) any national securities exchange or registered securities association to enforce compliance by its members and persons associated with its members with the provisions of this chapter, the rules, regulations, and orders thereunder, and the rules

of such exchange or association, or (3) any registered clearing agency to enforce compliance by its participants with the provisions of the rules of such clearing agency.

(f) Rules of self-regulatory organizations or Board

Notwithstanding any other provision of this chapter, the Commission shall not bring any action pursuant to subsection (d) or (e) of this section against any person for violation of, or to command compliance with, the rules of a self-regulatory organization or the Public Company Accounting Oversight Board unless it appears to the Commission that (1) such self-regulatory organization or the Public Company Accounting Oversight Board is unable or unwilling to take appropriate action against such person in the public interest and for the protection of investors, or (2) such action is otherwise necessary or appropriate in the public interest or for the protection of investors.

(g) Consolidation of actions; consent of Commission

Notwithstanding the provisions of section 1407(a) of title 28, or any other provision of law, no action for equitable relief instituted by the Commission pursuant to the securities laws shall be consolidated or coordinated with other actions not brought by the Commission, even though such other actions may involve common questions of fact, unless such consolidation is consented to by the Commission.

(h) Access to records

(1) The Right to Financial Privacy Act of 1978 [12 U.S.C. 3401 et seq.] shall apply with respect to the Commission, except as otherwise provided in this subsection.

(2) Notwithstanding section 1105 or 1107 of the Right to Financial Privacy Act of 1978 [12 U.S.C. 3405 or 3407], the Commission may have access to and obtain copies of, or the information contained in financial records of a customer from a financial institution without prior notice to the customer upon an ex parte showing to an appropriate United States district court that the Commission seeks such financial records pursuant to a subpena issued in conformity with the requirements of section 19(b)[1] of the Securities Act of 1933, section 21(b) of the Securities Exchange Act of 1934 [15 U.S.C. 78u(b)], section 42(b) of the Investment Company Act of 1940 [15 U.S.C. 80a-41(b)], or section 209(b) of the Investment Advisers Act of 1940 [15 U.S.C. 80b-9(b)], and that the Commission has reason to believe that—

(A) delay in obtaining access to such financial records, or the required notices, will result in—

(i) flight from prosecution;

(ii) destruction of or tampering with evidence;

(iii) transfer of assets or records outside the territorial limits of the United States;

(iv) improper conversion of investor assets; or

(v) impeding the ability of the Commission to identify or trace the source or disposition of funds involved in any securities transaction;

(B) such financial records are necessary to identify or trace the record or beneficial ownership interest in any security;

---

[1] See References in Text note below.

(C) the acts, practices or course of conduct under investigation involve—

(i) the dissemination of materially false or misleading information concerning any security, issuer, or market, or the failure to make disclosures required under the securities laws, which remain uncorrected; or

(ii) a financial loss to investors or other persons protected under the securities laws which remains substantially uncompensated; or

(D) the acts, practices or course of conduct under investigation—

(i) involve significant financial speculation in securities; or

(ii) endanger the stability of any financial or investment intermediary.

(3) Any application under paragraph (2) for a delay in notice shall be made with reasonable specificity.

(4)(A) Upon a showing described in paragraph (2), the presiding judge or magistrate judge shall enter an ex parte order granting the requested delay for a period not to exceed ninety days and an order prohibiting the financial institution involved from disclosing that records have been obtained or that a request for records has been made.

(B) Extensions of the period of delay of notice provided in subparagraph (A) of up to ninety days each may be granted by the court upon application, but only in accordance with this subsection or section 1109(a), (b)(1), or (b)(2) of the Right to Financial Privacy Act of 1978 [12 U.S.C. 3409(a), (b)(1), or (b)(2)].

(C) Upon expiration of the period of delay of notification ordered under subparagraph (A) or (B), the customer shall be served with or mailed a copy of the subpena insofar as it applies to the customer together with the following notice which shall describe with reasonable specificity the nature of the investigation for which the Commission sought the financial records:

"Records or information concerning your transactions which are held by the financial institution named in the attached subpena were supplied to the Securities and Exchange Commission on (date). Notification was withheld pursuant to a determination by the (title of court so ordering) under section 21(h) of the Securities Exchange Act of 1934 that (state reason). The purpose of the investigation or official proceeding was (state purpose)."

(5) Upon application by the Commission, all proceedings pursuant to paragraphs (2) and (4) shall be held in camera and the records thereof sealed until expiration of the period of delay or such other date as the presiding judge or magistrate judge may permit.

(6) Repealed. Pub. L. 114-113, div. O, title VII, § 708, Dec. 18, 2015, 129 Stat. 3030.

(7)(A) Following the expiration of the period of delay of notification ordered by the court pursuant to paragraph (4) of this subsection, the customer may, upon motion, reopen the proceeding in the district court which issued the order. If the presiding judge or magistrate judge finds that the movant is the customer to whom the records obtained by the Commission pertain, and that the Commission has obtained financial records or information contained therein in violation of

this subsection, other than paragraph (1), it may order that the customer be granted civil penalties against the Commission in an amount equal to the sum of—

(i) $100 without regard to the volume of records involved;

(ii) any out-of-pocket damages sustained by the customer as a direct result of the disclosure; and

(iii) if the violation is found to have been willful, intentional, and without good faith, such punitive damages as the court may allow, together with the costs of the action and reasonable attorney's fees as determined by the court.

(B) Upon a finding that the Commission has obtained financial records or information contained therein in violation of this subsection, other than paragraph (1), the court, in its discretion, may also or in the alternative issue injunctive relief to require the Commission to comply with this subsection with respect to any subpoena which the Commission issues in the future for financial records of such customer for purposes of the same investigation.

(C) Whenever the court determines that the Commission has failed to comply with this subsection, other than paragraph (1), and the court finds that the circumstances raise questions of whether an officer or employee of the Commission acted in a willful and intentional manner and without good faith with respect to the violation, the Office of Personnel Management shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the agent or employee who was primarily responsible for the violation. After investigating and considering the

evidence submitted, the Office of Personnel Management shall submit its findings and recommendations to the Commission and shall send copies of the findings and recommendations to the officer or employee or his representative. The Commission shall take the corrective action that the Office of Personnel Management recommends.

(8) The relief described in paragraphs (7) and (10) shall be the only remedies or sanctions available to a customer for a violation of this subsection, other than paragraph (1), and nothing herein or in the Right to Financial Privacy Act of 1978 [12 U.S.C. 3401 et seq.] shall be deemed to prohibit the use in any investigation or proceeding of financial records, or the information contained therein, obtained by a subpoena issued by the Commission. In the case of an unsuccessful action under paragraph (7), the court shall award the costs of the action and attorney's fees to the Commission if the presiding judge or magistrate judge finds that the customer's claims were made in bad faith.

(9)(A) The Commission may transfer financial records or the information contained therein to any government authority if the Commission proceeds as a transferring agency in accordance with section 1112 of the Right to Financial Privacy Act of 1978 [12 U.S.C. 3412], except that the customer notice required under section 1112(b) or (c) of such Act [12 U.S.C. 3412(b) or (c)] may be delayed upon a showing by the Commission, in accordance with the procedure set forth in paragraphs (4) and (5), that one or more of subparagraphs (A) through (D) of paragraph (2) apply.

(B) The Commission may, without notice to the customer pursuant to section 1112 or the Right to

Financial Privacy Act of 1978 [12 U.S.C. 3412], transfer financial records or the information contained therein to a State securities agency or to the Department of Justice. Financial records or information transferred by the Commission to the Department of Justice or to a State securities agency pursuant to the provisions of this subparagraph may be disclosed or used only in an administrative, civil, or criminal action or investigation by the Department of Justice or the State securities agency which arises out of or relates to the acts, practices, or courses of conduct investigated by the Commission, except that if the Department of Justice or the State securities agency determines that the information should be disclosed or used for any other purpose, it may do so if it notifies the customer, except as otherwise provided in the Right to Financial Privacy Act of 1978 [12 U.S.C. 3401 et seq.], within 30 days of its determination, or complies with the requirements of section 1109 of such Act [12 U.S.C. 3409] regarding delay of notice.

(10) Any government authority violating paragraph (9) shall be subject to the procedures and penalties applicable to the Commission under paragraph (7)(A) with respect to a violation by the Commission in obtaining financial records.

(11) Notwithstanding the provisions of this subsection, the Commission may obtain financial records from a financial institution or transfer such records in accordance with provisions of the Right to Financial Privacy Act of 1978 [12 U.S.C. 3401 et seq.].

(12) Nothing in this subsection shall enlarge or restrict any rights of a financial institution to challenge requests for records made by the Commission under

existing law. Nothing in this subsection shall entitle a customer to assert any rights of a financial institution.

(13) Unless the context otherwise requires, all terms defined in the Right to Financial Privacy Act of 1978 [12 U.S.C. 3401 et seq.] which are common to this subsection shall have the same meaning as in such Act.

(i) Information to CFTC

The Commission shall provide the Commodity Futures Trading Commission with notice of the commencement of any proceeding and a copy of any order entered by the Commission against any broker or dealer registered pursuant to section 78*o*(b)(11) of this title, any exchange registered pursuant to section 78f(g) of this title, or any national securities association registered pursuant to section 78*o*-3(k) of this title.

3. 15 U.S.C. 7246 provides:

Fair funds for investors

(a) Civil penalties to be used for the relief of victims

If, in any judicial or administrative action brought by the Commission under the securities laws, the Commission obtains a civil penalty against any person for a violation of such laws, or such person agrees, in settlement of any such action, to such civil penalty, the amount of such civil penalty shall, on the motion or at the direction of the Commission, be added to and become part of a disgorgement fund or other fund established for the benefit of the victims of such violation.

(b) Acceptance of additional donations

The Commission is authorized to accept, hold, administer, and utilize gifts, bequests and devises of property, both real and personal, to the United States for a disgorgement fund or other fund described in subsection (a) of this section. Such gifts, bequests, and devises of money and proceeds from sales of other property received as gifts, bequests, or devises shall be deposited in such fund and shall be available for allocation in accordance with subsection (a) of this section.

(c) Study required

(1) Subject of study

The Commission shall review and analyze—

(A) enforcement actions by the Commission over the five years preceding July 30, 2002, that have included proceedings to obtain civil penalties or disgorgements to identify areas where such proceedings may be utilized to efficiently, effectively, and fairly provide restitution for injured investors; and

(B) other methods to more efficiently, effectively, and fairly provide restitution to injured investors, including methods to improve the collection rates for civil penalties and disgorgements.

(2) Report required

The Commission shall report its findings to the Committee on Financial Services of the House of Representatives and the Committee on Banking, Housing, and Urban Affairs of the Senate within 180 days after of[1] July 30, 2002, and shall use such

---

[1] So in original. The word "of" probably should not appear.

findings to revise its rules and regulations as necessary. The report shall include a discussion of regulatory or legislative actions that are recommended or that may be necessary to address concerns identified in the study.

4. 15 U.S.C. 78t-1 provides:

Liability to contemporaneous traders for insider trading

(a) Private rights of action based on contemporaneous trading

Any person who violates any provision of this chapter or the rules or regulations thereunder by purchasing or selling a security while in possession of material, nonpublic information shall be liable in an action in any court of competent jurisdiction to any person who, contemporaneously with the purchase or sale of securities that is the subject of such violation, has purchased (where such violation is based on a sale of securities) or sold (where such violation is based on a purchase of securities) securities of the same class.

(b) Limitations on liability

(1) Contemporaneous trading actions limited to profit gained or loss avoided

The total amount of damages imposed under subsection (a) of this section shall not exceed the profit gained or loss avoided in the transaction or transactions that are the subject of the violation.

(2) Offsetting disgorgements against liability

The total amount of damages imposed against any person under subsection (a) of this section shall

be diminished by the amounts, if any, that such person may be required to disgorge, pursuant to a court order obtained at the instance of the Commission, in a proceeding brought under section 78u(d) of this title relating to the same transaction or transactions.

(3) Controlling person liability

No person shall be liable under this section solely by reason of employing another person who is liable under this section, but the liability of a controlling person under this section shall be subject to section 78t(a) of this title.

(4) Statute of limitations

No action may be brought under this section more than 5 years after the date of the last transaction that is the subject of the violation.

(c) Joint and several liability for communicating

Any person who violates any provision of this chapter or the rules or regulations thereunder by communicating material, nonpublic information shall be jointly and severally liable under subsection (a) of this section with, and to the same extent as, any person or persons liable under subsection (a) of this section to whom the communication was directed.

(d) Authority not to restrict other express or implied rights of action

Nothing in this section shall be construed to limit or condition the right of any person to bring an action to enforce a requirement of this chapter or the availability of any cause of action implied from a provision of this chapter.

(e) Provisions not to affect public prosecutions

This section shall not be construed to bar or limit in any manner any action by the Commission or the Attorney General under any other provision of this chapter, nor shall it bar or limit in any manner any action to recover penalties, or to seek any other order regarding penalties.

RECORD
AND
BRIEF

FILED
APR 10 2017

No. 16-529

IN THE
Supreme Court of the United States

CHARLES R. KOKESH,
Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF OF PETITIONER

CLINTON W. MARRS
MARRS GRIEBEL LAW, LTD.
1000 Gold Ave, SW
Albuquerque, NM 87102
(505) 433-3926
clinton@marrslegal.com

DAVID A. STRAUSS
SARAH M. KONSKY
JENNER & BLOCK SUPREME COURT AND APPELLATE CLINIC AT THE UNIVERSITY OF CHICAGO LAW SCHOOL
1111 E. 60th Street
Chicago, IL 60637
(773) 834-3189

ADAM G. UNIKOWSKY
Counsel of Record
ZACHARY C. SCHAUF
JENNER & BLOCK LLP
1099 New York Ave., NW,
Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

JAMES DAWSON
JENNER & BLOCK LLP
353 N. Clark St
Chicago, IL 60654

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

I. SEC DISGORGEMENT CLAIMS SEEK A "FORFEITURE." 1

A. "Forfeiture" Is Not Limited To Penalties 2

B. Historically, "Forfeiture" Was Not Limited To *In Rem* Forfeitures And Fines. 4

C. Today's *In Personam* Forfeitures Prove Petitioner's Case. 7

II. SEC DISGORGEMENT CLAIMS SEEK A "PENALTY." 8

A. Disgorgement Is Punitive Because It Is A Legal Consequence Of Wrongdoing. 9

B. Disgorgement Is Punitive Because It Is Noncompensatory 10

1. Disgorgement Is Not Restitution. 11

2. There Are Only Two Categories Of Backwards-Looking Payments: Compensatory And Punitive. 13

3. The SEC's Ratification Arguments Fail..... 16

C. Disgorgement Goes Beyond Restoring A Plaintiff To The Status Quo Ante..... 18

D. The Government's Contradictory Positions Are Indefensible..... 19

III. THE SEC'S POSITION CONTRADICTS THE PURPOSE OF §2462..... 21

IV. THE CANON OF NARROW CONSTRUCTION DOES NOT APPLY..... 24

CONCLUSION 25

TABLE OF AUTHORITIES

CASES

Adams v. Woods, 6 U.S. (2 Cranch) 336 (1805) 1, 8

Alexander v. Sandoval, 532 U.S. 275 (2001) 17

Austin v. United States, 509 U.S. 602 (1993) 10

Baldaracco v. Commissioner, 464 U.S. 386 (1984) 25

Brady v. Daly, 175 U.S. 148 (1899) 13

Gabelli v. SEC, 133 S. Ct. 1216 (2013) 1, 21, 23

Great-West Life & Annuity Insurance Co. v. Knudson, 534 U.S. 204 (2002) 11

Guaranty Trust Co. of New York v. United States, 304 U.S. 126 (1938) 24

Hudson v. United States, 522 U.S. 93 (1997) 9

Kelly v. Robinson, 479 U.S. 36 (1986) 14

Libretti v. United States, 516 U.S. 29 (1995) 10

Meeker v. Lehigh Valley Railroad Co., 236 U.S. 412 (1915) 4

Porter v. Warner Holding Co., 328 U.S. 395 (1946) 13

Schine Chain Theatres, Inc. v. United States, 334 U.S. 110 (1948) 10

SEC v. Cole, 661 F. App'x 52 (2d Cir. 2016) 21

SEC v. Fischbach Corp., 133 F.3d 170 (2d Cir. 1997) 9, 12

SEC v. Rind, 991 F.2d 1486 (9th Cir. 1993) 12

SEC v. Wyly, 56 F. Supp. 3d 394 (S.D.N.Y. 2014), *appeal docketed*, No. 15-2821 (2d Cir. Sept. 4, 2015) 22, 23

Stockwell v. United States, 80 U.S. (13 Wall.) 531 (1871) 5

United States v. Bajakajian, 524 U.S. 321 (1998) 4, 5, 6, 9

United States v. Beebe, 127 U.S. 338 (1888) 12

United States v. Maillard, 26 F. Cas. 1140 (S.D.N.Y. 1871) 6, 25

STATUTES

15 U.S.C. §78t-1(b)(2) 17

15 U.S.C. §7246 12

21 U.S.C. §853(a)(1) 20

28 U.S.C. §2415 1

28 U.S.C. §2462 ..... *passim*

Act of Aug. 4, 1790, §10, 1 Stat. 145, 156 6

Act of July 31, 1789, §36, 1 Stat. 29, 48 5

Act of Mar. 2, 1791, §20, 1 Stat. 199, 204 6

OTHER AUTHORITIES

Black's Law Dictionary (5th ed. 1979) 8

Brief for SEC, *SEC v. Quan*, 817 F.3d 583 (8th Cir. 2016) (No. 14-3707), 2015 WL 1778755 11

Brief for SEC, *SEC v. Smith*, 646 F. App'x 42 (2d Cir. 2016) (No. 15-1314), 2015 WL 7185051 11

Brief for SEC, *SEC v. Wyly*, No. 15-2821 (2d Cir. Apr. 8, 2016), 2016 WL 1426153 ..... 22, 23

Brief in Opposition, *Honeycutt v. United States*, 137 S. Ct. 588 (2016) (No. 16-142), 2016 WL 6519854 20

Transcript of Oral Argument, *Honeycutt v. United States*, No. 16-142 (U.S. Mar. 29, 2017) 20

3 St. George Tucker, *Blackstone's Commentaries with Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia* (1803) 3

To argue that disgorgement is not a "forfeiture," the SEC urges an artificially narrow definition of "forfeiture" that contradicts 200 years of history. To argue that disgorgement is not a "penalty," the SEC invents a new category of remedy that also contradicts 200 years of history—a remedy that is supposedly compensatory enough to get around §2462, yet punitive enough to evade the limitations periods that would apply to genuinely compensatory remedies. And all this to escape any statute of limitations, a result that this Court declared 200 years ago would be "utterly repugnant," *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 342 (1805), and that remains just as repugnant today. *Gabelli v. SEC*, 133 S. Ct. 1216, 1223 (2013) (reaffirming *Adams*).

The Court should reject the SEC's tortured arguments. Disgorgement, like every other backwards-looking money remedy, is subject to a statute of limitations.

I. SEC DISGORGEMENT CLAIMS SEEK A "FORFEITURE."

This case turns on a dispute over the meaning of "forfeiture" under §2462. Petitioner contends that "forfeiture" covers any order to turn over money to the government, as sovereign, due to a violation of law[1]—which readily encompasses disgorgement. Such orders could be either remedial or punitive, *in personam* or *in*

---

[1] Contra the SEC (SEC Br. 13), this definition does not encompass *all* money payments to the government. For instance, it does not cover money judgments arising from contract and tort claims brought by the government in its proprietary capacity, which are subject to other limitations periods. 28 U.S.C. §2415.

rem. Pet. Br. 13-15. The SEC advocates a narrower interpretation. In its view, forfeiture covers only two discrete categories of supposedly "penal" forfeitures—*in rem* forfeitures of property, and money fines. SEC Br. 35-37.

The text and history of §2462 demonstrate that Petitioner is correct.

A. "Forfeiture" Is Not Limited To Penalties.

The SEC contends that "forfeiture" encompasses only forfeitures that are also penalties. As a textual matter, this theory has a basic flaw: §2462 *already* covers "penalt[ies]." Thus, under the SEC's interpretation, "forfeiture" is surplusage. Avoiding surplusage requires construing "forfeiture" to include some nonpenal remedies.

Doubtless, "penalty" and "forfeiture" overlap considerably. But as Petitioner explained, "forfeiture" is in some respects broader. Pet. Br. 13-15. And by separately including "forfeiture," Congress ensured courts would not have to decide, case by case, whether a remedy was "penal"—which can be debatable, as this case shows. So long as a remedy was a "forfeiture," Congress ensured §2462 would cover it. Yet the SEC would reintroduce that debate by atextually limiting "forfeiture" to "penal" forfeitures.

The SEC relies on the *noscitur a sociis* canon: that because "penalties" and "fines" are punitive, so are "forfeitures." SEC Br. 34. But the *noscitur a sociis* canon does not support rendering a statutory term superfluous. Indeed, correctly employed, *noscitur a*

sociis supports Petitioner. Fines and penalties encompass *in personam* money judgments; thus, *noscitur a sociis* suggests that forfeitures also encompass *in personam* money judgments, even if not precisely limited to "fines" and "penalties." Disgorgement meets that description; *in rem* remedies do not. Yet the SEC would *include* in rem forfeitures in §2462 while *excluding* disgorgement, precisely contrary to *noscitur a sociis*' teaching.

Contemporary dictionaries support Petitioner's analysis. As Petitioner explained, they define forfeiture as the loss of property based on fault, which readily encompasses disgorgement. Pet. Br. 13.

The SEC responds with various old sources ostensibly characterizing forfeiture as "punishment," leading off with St. George Tucker's edition of Blackstone. SEC Br. 33. The SEC misquotes that source, which states that "forfeiture" includes remedial awards: It describes forfeiture as "a punishment for some crime or misdemeanor in the party forfeiting, and as a compensation for the offense and injury committed against him to whom they are forfeited." The SEC quotes the first part of the sentence, while omitting the second (underlined) part.

Even the sources the SEC accurately quotes do not exclude disgorgement; they simply characterize forfeiture as "[s]omething lost by the commission of a crime" or similar. SEC Br. 33 (quotation marks omitted). But disgorgement, too, can be imposed only as a consequence of illegal activity. The SEC is advancing a hypertechnical argument that even though wrongdoing is a *prerequisite* for disgorgement, and even

though disgorgement's *point* is to redress "wrongdoing," disgorgement is still not a forfeiture for wrongdoing. None of the SEC's old sources recognize this distinction.

The SEC emphasizes that *Meeker v. Lehigh Valley Railroad Co.*, 236 U.S. 412, 423 (1915), used the word "punitive" to characterize §2462's coverage. But *Meeker* then juxtaposed such remedies with "strictly remedial" damages actions which "solely ... redress[] a private injury." *Id.* It held that such private damages claims were not subject to §2462, but instead to a statute of limitations governing private claims. *Id.* at 423-24. This does not remotely suggest that *government* actions that do not "solely" redress private injuries may be brought *forever*.

The SEC's theory is also self-contradictory. The SEC claims that "forfeiture" covers *in rem* forfeitures, invoking the legal fiction that they punished the property. SEC Br. 36. But the SEC ignores the more pertinent point: these forfeitures were "not considered punishment" as to their owners. *United States v. Bajakajian*, 524 U.S. 321, 331 (1998); *see* Pet. Br. 14. Yet the SEC claims that §2462 *excludes* disgorgement because it has this same feature.

B. Historically, "Forfeiture" Was Not Limited To *In Rem* Forfeitures And Fines.

The Court need not engage in abstract debate over what "forfeiture" means. It should look to history, which definitively shows that the SEC's narrow understanding of "forfeiture" is wrong. Forfeiture encompasses nonpunitive remedies, and is not limited to fines and *in*

rem forfeitures of property.

As Petitioner explained, early customs statutes required persons to "forfeit" the value of unlawfully imported goods. These were remedies sought by the government in enforcement actions, yet they were considered nonpunitive. *Stockwell v. United States*, 80 U.S. (13 Wall.) 531, 546-47 (1871); *Bajakajian*, 524 U.S. at 330-31.

If these remedies—which fall outside of the SEC's two "penal" categories of forfeitures—are "forfeitures," the SEC's case collapses. Not only would these remedies prove that the SEC's taxonomy of "forfeitures" is too narrow, but they would undermine the SEC's assertion that there was no "historic form of 'forfeiture' equivalent to disgorgement." SEC Br. 39. When someone violates customs laws, the unlawfully imported goods are the proceeds—and a forfeiture of their value accomplishes the function of disgorgement.

So to prevail, the SEC must show that these historic remedies are *not* forfeitures under §2462. Here is the argument on which the SEC stakes its case: "[M]ere existence of the word 'forfeit' in the statute does not make the amount in question a 'forfeiture.'" SEC Br. 38.

This is obviously wrong. Petitioner's brief cited an early customs statute requiring persons to "forfeit and pay a sum double the value" of unlawfully imported goods. Pet. Br. 15 (citing Act of July 31, 1789, §25, 1 Stat. 29, 43). *That very Act* includes a three-year statute of limitations applicable to any "penalty or forfeiture." *Id.* §36, 1 Stat. at 48. The SEC cannot be serious that this provision did not encompass the requirement to

"forfeit" money under that same Act, based on a putative distinction between "forfeiture's" verb and noun forms. Moreover, *numerous* early customs statutes used the noun "forfeiture." *See, e.g.*, Act of Aug. 4, 1790, §10, 1 Stat. 145, 156 (violator "shall forfeit a sum of money equal to the value of such goods," and providing rules for trials for "such forfeiture"); Act of Mar. 2, 1791, §20, 1 Stat. 199, 204. Indeed, 19th-century courts actually *applied* §2462's predecessor to a similar customs statute. *United States v. Maillard*, 26 F. Cas. 1140, 1141-42 (S.D.N.Y. 1871). *Maillard* explained that courts should *assume* that such remedies "accruing to the United States" are "intended to be included" within statutes of limitations for "penalties and forfeitures," "unless they are specially excepted." *Id.* at 1142.

By contrast, the SEC's authority consists of a 1943 case offering the irrelevant holding that the False Claims Act is civil rather than criminal; a 2016 New York treatise; and a poem. SEC Br. 38-39.

The SEC also distinguishes such old statutes on the ground that they required forfeiture of a multiple of the ill-gotten gains. SEC Br. 39. That premise is wrong: some early customs statutes forfeited only the value itself. *Bajakajian*, 524 U.S. at 345 (Kennedy, J., dissenting) (noting that fact). Even for double-value forfeitures, the SEC misses the point. These statutes *combined* the functions of today's SEC disgorgements and civil penalties. The entire remedy—including the disgorgement—was "forfeiture." The SEC cannot avoid a limitations period by dividing the remedy in two. Pet. Br. 17-18. More fundamentally, the SEC articulates no coherent definition of forfeiture that includes such

nonpunitive remedies and excludes disgorgement.

Finally, the SEC asserts that disgorgement is an "equitable remedy," which "reinforces the conclusion" that §2462 does not apply. SEC Br. 41. The SEC scatters the adjective "equitable" throughout its brief, and also briefly contends that disgorgement is "equitable" because it is in the "public interest." SEC Br. 18-19. Beyond that, however, the SEC does not defend the claim that disgorgement is "equitable" in the historical sense, or that this matters to §2462. Petitioner's brief addressed this issue in detail, Pet. Br. 49-62, but the SEC completely ignores this section of Petitioner's brief. For the unrebutted reasons explained by Petitioner, disgorgement's supposedly "equitable" nature does not exclude it from §2462.

C. Today's *In Personam* Forfeitures Prove Petitioner's Case.

In the 1970s, Congress enacted *in personam* "forfeitures" of crime's proceeds. Pet. Br. 16. This remedy is functionally identical to disgorgement—and Congress called it "forfeiture." This powerfully supports classifying disgorgement as a "forfeiture" under §2462.

The SEC claims these statutes are irrelevant because they postdated §2462, and that disgorgement is not a "forfeiture" because there were no "historic form[s] of 'forfeiture' equivalent to disgorgement." SEC Br. 39. That is not true, as just explained—but regardless, what matters is that disgorgement falls comfortably within the historic definition of "forfeiture." There were no historic prison decrowding or school

desegregation orders, but they are still "injunctions." So too with "forfeiture."

Critically, the SEC offers no evidence that the meaning of "forfeiture" morphed between 1839 and the 1970s. Definitions in the 1970s were essentially identical to the older definitions. *E.g.*, *Black's Law Dictionary* 584 (5th ed. 1979) ("Something to which the right is lost by the commission of a crime or fault or the losing of something by way of penalty"). When Congress enacted *in personam* forfeiture-of-proceeds statutes in the 1970s, it understood that such remedies fell within the longstanding definition of "forfeiture." So too with disgorgement.

* * *

In *Adams*, this Court found the idea that government enforcement actions could "be brought at any distance of time" to be "utterly repugnant to the genius of our laws." 6 U.S. (2 Cranch) at 342. It thus declined to limit §2462's predecessor to a "particular mode of proceeding," because that would "attribute a capriciousness ... which could not be accounted for." *Id.* at 340-41. The SEC's efforts to gerrymander "forfeiture" to exclude disgorgement suffer from the same flaw.

II. SEC DISGORGEMENT CLAIMS SEEK A "PENALTY."

Disgorgement is also a "penalty." As Petitioner argued (Pet. Br. 23-24), and the SEC does not dispute, the question is whether disgorgement serves—even in

part—to punish.[2] It does.

A. Disgorgement Is Punitive Because It Is A Legal Consequence Of Wrongdoing.

The SEC contends that disgorgement is nonpunitive because it "prevents unjust enrichment by forcing a defendant to divest funds that he acquired unlawfully." SEC Br. 16. But as Petitioner explained (Pet. Br. 26), this argument's premise is that the defendant acted "unlawfully" and enrichment would be "unjust." In other words, the defendant did wrong, so there must be legal consequences. That is what punitive remedies do.

Moreover, disgorgement's "primary purpose," *SEC v. Fischbach Corp.*, 133 F.3d 170, 175 (2d Cir. 1997), is deterrence—a hallmark of punishment. Pet. Br. 25. The SEC observes that compensatory damages also deter. SEC Br. 28. True, but that is an ancillary effect of their primary (compensatory) purpose. Disgorgement exists to impose negative consequences on wrongdoing, which is why deterrence is a "primary" purpose.

The SEC's fundamental claim is that seizing the tainted effects of wrongdoing cannot be punitive. The SEC offers no historical support for this view, and it is wrong. *In rem* forfeitures of crime's instrumentalities, and *in personam* forfeitures of proceeds, take property to which defendants are not "lawfully entitled." SEC Br. 16. Yet both are considered "punishment." Pet. Br. 25-

---

[2] In a "Cf." cite, the SEC intimates (SEC Br. 28) that this test may have been overruled by *Hudson v. United States*, 522 U.S. 93 (1997). Not so. *Hudson* rejected the test as to the Double Jeopardy Clause. *Id.* at 101-02. For civil penalties, however, the "in part" test still applies. *Bajakajian*, 524 U.S. at 331 n.6.

26; *Austin v. United States*, 509 U.S. 602, 621-22 (1993); *Libretti v. United States*, 516 U.S. 29, 39, 45 (1995).

Saying disgorgement "restores the status quo," SEC Br. 17 (quotation marks omitted), does not assist the SEC. To begin, a status quo remedy must compensate the injured party, but that is not disgorgement's purpose. Pet. Br. 32. Even considering only defendants, disgorgement leaves them worse off than before *the judgment*. The SEC claims defendants should be restored to the status quo before *the wrongdoing*. But that claim's premise is that consequences should follow from wrongdoing—again, punishment's hallmark.

The divestiture analogy does not help the SEC. SEC Br. 17. Divestiture is a form of injunction that involves no money payment and breaks up monopolies going forward. *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110, 128-29 (1948).

B. Disgorgement Is Punitive Because It Is Noncompensatory.

Debates about whether a remedy is "penal" or "remedial" can acquire an angels-on-the-head-of-a-pin quality. Thus, the Court should look to the history and purpose of this taxonomy. They resolve the case in Petitioner's favor. Historically, this Court has recognized two classes of backward-looking payments to the government: payments that compensate, and penalties. Section 2462 covers the latter and not the former. That distinction accords with the historic purpose of providing special safeguards when the government extracts money payments as sovereign enforcer of the laws. Under this precedent,

disgorgement is a penalty.

1. Disgorgement Is Not Restitution.

The SEC claims disgorgement is nonpunitive because, like restitution, it is compensatory for investors. SEC Br. 19-22. This claim contradicts the SEC's oft-stated positions, and is wrong.

Petitioner gave three examples in which the SEC argued that disgorgement's purpose was *not* to compensate. Pet. Br. 27. In *Custable* and *Martin* (cited at Pet. Br. 27), the SEC made this point to establish victims lacked standing to challenge distribution of disgorged funds. In *Smith*, the SEC defended an $87.5 million disgorgement, despite criminal restitution of only $5.7 million; the SEC explained that "the loss sustained by the victims" is "irrelevant." Br. of SEC at 32, *SEC v. Smith*, 646 F. App'x 42 (2d Cir. 2016) (No. 15-1314), 2015 WL 7185051 (quotation marks and brackets omitted).

Another example: Petitioner argued that disgorgement is not "equitable" under *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002). Pet. Br. 56-60. As noted, the SEC ignores this argument; it does not even cite *Knudson*. This may be because, in lower courts, the SEC distinguishes *Knudson* by arguing that it involves compensatory restitution, whereas disgorgement "does not aim to compensate." *See, e.g.*, Br. for SEC at 43, *SEC v. Quan*, 817 F.3d 583 (8th Cir. 2016) (No. 14-3707), 2015 WL 1778755 (quotation marks omitted).

The SEC's lower-court positions are correct. Courts may have discretion to direct disgorgement to victims,

but this possibility—which is *never* required, *Fischbach*, 133 F.3d at 176—does not mean disgorgement is compensatory, as multiple courts have held. Pet. Br. 27-28. Indeed, as the SEC acknowledges (SEC Br. 20-21 n.4), it regularly brings cases in which compensation is impossible, such as Foreign Corrupt Practices Act cases, which generate billions in disgorgements for the Treasury. The Court's ruling will apply in those suits. Moreover, a remedy is punitive if it punishes even in part, Pet. Br. 23-24; thus, the fact that payments *sometimes* reach victims cannot make disgorgement *completely* nonpunitive, as required to fall outside §2462. Civil penalties, too, often go to victims, 15 U.S.C. §7246, but that does not make them compensatory.

Moreover, the SEC's premise—that there would be no statute of limitations if the goal was to compensate investors—is false. This Court has long held that when the government is the "complainant party" but sues "for the sole benefit of a private person," time limitations for private plaintiffs apply. *United States v. Beebe*, 127 U.S. 338, 344, 347 (1888). Thus, if disgorgement is compensatory, private statutes of limitations would apply. Yet the SEC has previously persuaded courts *not* to apply such statutes to disgorgement, arguing, predictably, that "[t]he theory behind the remedy is deterrence and not compensation." *SEC v. Rind*, 991 F.2d 1486, 1490 (9th Cir. 1993).

The SEC seems to place disgorgement within some twilight zone of "often compensatory"— compensatory enough to dodge §2462, noncompensatory enough to avoid other legal restrictions on compensatory remedies. This position is untenable. Disgorgement's purpose

should not oscillate depending on the SEC's litigation needs.

The SEC says that Petitioner advocates a case-by-case approach that would "substantially complicate" §2462's application. SEC Br. 27. Not so. Petitioner agrees that a single statute of limitations should apply categorically to disgorgement. This is so for the SEC's practical reasons, and a doctrinal reason: Categorically, disgorgement always yields, in the first instance, payment of unlawful gains to the government not as compensation for the government's loss. Hence, disgorgement is not restitution, regardless of how the government later distributes funds.

2. There Are Only Two Categories Of Backwards-Looking Payments: Compensatory And Punitive.

This Court's cases recognize only two categories of backwards-looking money payments: compensatory and punitive. The key case is *Brady v. Daly*, 175 U.S. 148 (1899), which defines the line between penalties and non-penalties under §2462. Pet. Br. 29-31. *Brady* held that a compensatory payment to a *victim* was remedial, whereas the same payment to the *government* in a qui tam action was punitive. 175 U.S. at 155 (statute that gave "right to recover back money" was "remedial as to the loser" but "penal as regards the suit by" the qui tam plaintiff).

Likewise, *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), held that payments to victims were remedial, whereas payments to the government, consisting of a multiple of the unlawfully-earned gains, were penalties.

Pet. Br. 31-32. And *Kelly v. Robinson*, 479 U.S. 36 (1986), held a criminal restitution order was "fine, penalty, or forfeiture" under bankruptcy law because it had a noncompensatory purpose. Pet. Br. 28-29.

The SEC has no adequate answer. As to *Brady*, the SEC says it "establish[es] only that a compensatory remedy is not a penalty." SEC Br. 26. But the SEC just ignores *Brady*'s other statement that the equivalent payment to the government was a penalty *because it was noncompensatory*.

Regarding *Porter*, the SEC emphasizes that the payment to the government exceeded the unlawfully-earned gains. SEC Br. 26-27. That misses the point. *Porter*'s "penalty" merged the "disgorgement" and "civil penalty" remedies in SEC enforcement actions today. But slicing up the remedy does not change its nature. Pet. Br. 32-33.

Finally, the SEC pitches *Kelly* as turning on state sovereignty. SEC Br. 25-26. But it quotes exclusively from *Kelly*'s Part II, which principally addressed the question—irrelevant here—of whether restitution orders were "debts," culminating in the Court expressing "serious doubts." 479 U.S. at 50. The Court's holding came in Part III, which found that even if restitution orders were debts, they were a nondischargeable "fine, penalty, or forfeiture." *Id.* at 50-53. That conclusion turned on the passage Petitioner cited: that criminal restitution's "focus" was not on "the victim's desire for compensation." *Id.* at 53. Indeed, the Court indicated (in dicta) that the same rule would apply to federal restitution orders. *Id.* at 53 n.14.

The SEC has a deeper problem. It does not dispute Petitioner's showing that at §2462's enactment, the categories of "forfeiture" and "penalty" covered every noncompensatory backwards-looking payment to the government. Pet. Br. 34-35. Hence, it is common ground that, until the 1970s, there were only two categories of backwards-looking payments to the government: compensatory and punitive. Yet the SEC claims that its invention of "disgorgement" yielded a *third* category—one that straddles the line between compensatory and punitive remedies, and thus avoids limitations periods for *both* compensatory *and* punitive remedies.

The SEC regards disgorgement's ostensible historical novelty as a reason it should prevail, *e.g.* SEC Br. 39, but it is actually a reason the SEC should lose. The Court should interpret §2462 in light of its drafters' background understanding that backwards-looking payments to the government were either punitive or compensatory. It should reject the SEC's attempt to avoid statutes of limitations by inventing a new, intermediate category that had gone unrecognized for the first two centuries of the Republic.

Moreover, §2462 is an essential constraint on the government's ability to extract noncompensatory payments—the purpose underlying numerous historical provisions, including the Excessive Fines Clause. Pet. Br. 32-35. The SEC insists that those provisions applied only to "penal" remedies and not disgorgement, SEC Br. 28, but that presumes the answer to the question presented. The historic purposes underlying protections against "penal" remedies apply equally to disgorgement, which underscores why disgorgement should be

classified as such.

3. The SEC's Ratification Arguments Fail.

The SEC maintains that because Congress has authorized the SEC to obtain civil penalties beyond disgorgement, and refers separately to "disgorgement" and "civil penalties," this means that Congress has implicitly ratified the SEC's theory that disgorgement is not a "penalty" under §2462. SEC Br. 22-25.

This argument fails. First, there is evidence that Congress views disgorgement as penal: it included CFTC disgorgements (which unlike SEC disgorgements, are expressly authorized by statute) in a section on "civil penalties," and characterized SEC disgorgement as a noncompensatory "sanction." Pet. Br. 25, 28.

Second, when Congress authorized the SEC to seek civil penalties in 1990, there is no indication in the text or legislative history that Congress intended to treat civil penalties and disgorgement differently for limitations purposes. Indeed, given that the measure of civil penalties is identical to the measure of disgorgement—*i.e.*, the defendant's illicit gains (Pet. Br. 44)—it is unlikely that Congress would have meant those two remedies to apply over different time spans.

Congress' use of the word "disgorgement" in the U.S. Code, rather than "penalty," does not reflect an intent to exclude it from §2462. Rather, it reflects the fact that the SEC was already using the word "disgorgement." The SEC began seeking disgorgement in the early 1970s. Pet. Br. 3. "Disgorgement" first appeared in the

U.S. Code in 1988, in a provision directing that "disgorgements" be "[o]ffset[]" against liability to victims of insider trading. 15 U.S.C. §78t-1(b)(2).

The SEC also observes that in 2002, Congress conferred the power on the SEC to seek "equitable relief." It infers that disgorgement is "equitable relief," and hence falls outside of §2462. Not so. First, this provision did not *confer* authority on the SEC to obtain disgorgement, given that the SEC had already been obtaining disgorgement for 30 years. To the extent this provision is understood as *ratifying* the SEC's ability to obtain disgorgement, this has nothing to do with the statute of limitations. Moreover, Petitioner explained how the application of §2462 is compatible with the characterization of disgorgement as "equitable." Pet. Br. 49-56. The SEC ignores this analysis altogether.

The SEC also claims that Congress' failure to enact an express statute of limitations on disgorgement is an implicit ratification of the SEC's ability to seek stale disgorgements. SEC Br. 44-45. But this Court accords "reliance on congressional inaction ... little weight." *Alexander v. Sandoval*, 532 U.S. 275, 292 (2001) (quotation marks omitted). That rule is especially apt here, because the SEC's efforts to seek disgorgement outside the five-year limitations period are recent. Before 1990, when Congress authorized the SEC to obtain civil penalties, the SEC had *never* sought to do so. Pet. Br. 4. Most reported cases on this issue are from the past five years, following *Gabelli*. *Id.*[3]

---

[3] The SEC states that some recent cases in which it sought stale

C. Disgorgement Goes Beyond Restoring A Plaintiff To The Status Quo Ante.

The SEC's characterization of disgorgement as merely restoring the status quo also ignores the real world. The SEC has successfully argued that wrongdoers must disgorge profits that went to *anyone*, with no deduction for expenses. Such disgorgements do not restore the status quo. Pet. Br. 35-37.

The SEC responds that this case "does not implicate that concern" because the payments that went to third parties were for "expenses for which he would otherwise have been responsible." SEC Br. 29 & n.9.

That is wrong on the facts—many payments went to third-party officers, and were not payment for "expenses." SEC Br. 6. It is also wrong on the law. The SEC argues (SEC Br. 27) that disgorgement's limitations period is analyzed categorically. Petitioner agrees, for both doctrinal and practical reasons. Doctrinally, the SEC has *defined* disgorgement as a remedy requiring payment of all proceeds that went to everyone, with no deduction for expenses. Pet. Br. 35-37. The SEC observes (SEC Br. 29-30) that there are "equitable limitations" on disgorgement, but it does not claim that the cases in which it successfully defined disgorgement so broadly were wrongly decided. Thus, that definition should govern for limitations purposes—regardless of whether funds happened to reach third parties in a particular case. Practically, it would be

---

disgorgements were *filed* before *Gabelli*. SEC Br. 46 n.17. But the remedial phase—when the SEC sought the disgorgements—began after.

unmanageable for the statute of limitations to depend on remedial-stage evidence regarding how particular dollars were directed.

Thus, the SEC cannot shrug off cases defining disgorgement broadly as factually distinguishable. Indeed, if the SEC prevails here, it will seek to apply that holding in every disgorgement case, including cases where it seeks third-party proceeds. Yet the SEC offers no theory on how such broader disgorgements restore the defendant to the status quo ante—the linchpin of its argument that disgorgement is nonpenal.

D. The Government's Contradictory Positions Are Indefensible.

The SEC is at its worst when defending the proposition that disgorgement changes from a "penalty" to not, depending on what yields the most money to the government. SEC Br. 30-32.

The government has previously filed a brief in this Court arguing that a disgorgement to HUD was a "fine, penalty, or forfeiture" under federal bankruptcy law, and hence nondischargeable. Pet. Br. 37-38. It sticks to that position. The government's justification is to refer back to its discussion of *Kelly* and claim that different "principles" govern bankruptcy. SEC Br. 30. But the "principles" cited in the SEC's discussion of *Kelly* are not only inapposite (*see supra* at 14), but they addressed state criminal judgments; they had nothing to do with disgorgement. The government observes that subsequent legislation rendered SEC disgorgements nondischargeable in bankruptcy, but that does not moot the issue: that legislation does not apply to non-SEC

disgorgements, such as the HUD disgorgement itself.

The government also sticks to its position that Petitioner's disgorgement is simultaneously a "penalty" for limitations purposes and not a "penalty" on his taxes. The government's vague excuse is to assert that the two provisions "have different language" (without specifying the differences), and "different purposes" (also unspecified). SEC Br. 31.

It is evident that the government will characterize disgorgement in whatever way is necessary to maximize government revenues. That should not be. Disgorgement should not mutate from punitive to nonpunitive, depending on the government's litigation needs.

Disgorgement is also functionally identical to the remedy of forfeiture of "proceeds" under statutes like 21 U.S.C. §853(a)(1). The government routinely argues that such statutes are punitive. Petitioner's opening brief cited the example of the government's Brief in Opposition in *Honeycutt v. United States*, which referred to forfeiture as a "'formidable penalty.'" BIO at 17, *Honeycutt v. United States*, 137 S. Ct. 588 (2016) (No. 16-142), 2016 WL 6519854 (citation omitted). As recently as the *Honeycutt* oral argument, the government characterized §853(a)(1) as a "financial penalty that attaches to drug [offenses]," analogous to a jail sentence. Tr. of Oral Argument at 30:16-31:14, *Honeycutt v. United States* (No. 16-142) (U.S. Mar. 29, 2017). Whatever the outcome of *Honeycutt*, the government should be consistent on whether giving up

the proceeds of illegal activity is, or is not, punitive.[4]

III. THE SEC'S POSITION CONTRADICTS THE PURPOSE OF §2462.

Statutes of limitations prevent the government from reviving "claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Gabelli*, 133 S. Ct. at 1221 (quotation marks omitted). They reflect the judgment that "even wrongdoers are entitled to assume that their sins may be forgotten." *Id.* (quotation marks omitted). Yet the SEC would abolish them for disgorgement.

The SEC claims no limitations period should apply because "[n]o principle of fairness" entitles a "robber" to keep his "loot." SEC Br. 42. But statutes of limitations ensure that defendants have a fair chance to defend themselves against government accusations that they are "robbers" with "loot." The risk of lost evidence and faded memories does not disappear because the SEC styles its claim "disgorgement."

The SEC contends that for statutes of limitations purposes, disgorgement should be treated like injunctions rather than penalties. SEC Br. 42-43. But there is a reason, tied to the purposes of statutes of limitations, for treating injunctions differently. Injunctions are forward-looking: There must be a "substantial likelihood that the defendant ... will violate

---

[4] The SEC's position, which courts have adopted, is that co-conspirators should be jointly and severally liable for disgorgement, regardless of whether a co-conspirator personally benefited. *See, e.g., SEC v. Cole*, 661 F. App'x 52, 53-54 (2d Cir. 2016).

securities laws in the future." Pet. App. 37a (quotation marks omitted). Indeed, courts have held that injunctions that do not prevent present danger, but instead punish for past dereliction, *are* "penalties" under §2462. Pet. Br. 52. Thus, injunctions falling outside §2462 inherently cannot be stale, because the relevant violation lies in the future. By contrast, disgorgement and penalties are backwards-looking remedies calculated in the identical way. Pet. Br. 44. The prejudice associated with the passage of time is therefore identical. *Id.* Labeling disgorgement "equitable" does not change this fact.

The SEC claims statutes of limitations are unnecessary because courts can consider the passage of time in measuring relief. Pet. Br. 43. Not so. First, the SEC's rule would permit courts to consider the passage of time only at the remedial stage—after the trial is over—and thus offers no protection from the burden of defending against stale claims. A distinct equitable doctrine—laches—requires pretrial dismissal based on excessive passage of time. But the government's longstanding position is that laches does not apply to it, Pet. Br. 41, 61, and its brief does not suggest otherwise.

Second, even after trial, this protection is flimsy. That is clear from the *Wyly* case, discussed in the amicus brief by Charles Wyly's executor. The SEC sought disgorgement going back 22 years, with prejudgment interest alone of $257 million. *SEC v. Wyly*, 56 F. Supp. 3d 394, 433 (S.D.N.Y. 2014), *appeal docketed*, No. 15-2821 (2d Cir. Sept. 4, 2015); Br. of SEC at 62, *SEC v. Wyly*, No. 15-2821 (2d Cir. Apr. 8, 2016) ("SEC *Wyly* Br."), 2016 WL 1426153. The District Court observed

that "the SEC is, at least in part, responsible for the delay" and found it "appropriate to consider ... fairness." *Wyly*, 56 F. Supp. 3d at 433. Over the SEC's objection, it did so by applying a lower interest rate—which decreased prejudgment interest to a mere $105 million, still going back 22 years, plus nearly $200 million in disgorgement. *Id.* at 434; SEC *Wyly* Br. at 62. This is not an adequate substitute for a statute of limitations.

The SEC suggests that statutes of limitations are unnecessary because it can be trusted to bring suits quickly; that it can seek injunctions or penalties arising within the limitations period anyway, so there is no point in protecting defendants from more distant claims; and that imposing a statute of limitations would make it easier for wrongdoers to avoid consequences. (SEC Br. 45-48). These arguments would support abolishing statutes of limitations for SEC penalties—indeed, for *all* government enforcement actions. Centuries of legal tradition, which establish that statutes of limitations are "vital to the welfare of society," dictate otherwise. *Gabelli*, 133 S. Ct. at 1221 (quotation marks omitted). The SEC's promise that it can be trusted to bring actions quickly is particularly hollow given the recent flood of stale disgorgement claims, and the many reported instances of the SEC pursuing stale claims due to changed enforcement strategies. Pet. Br. 41-43.

But the deepest flaw in the SEC's position is its profound *randomness*. As Petitioner's brief explained, the SEC argues that a punitive judgment payable to the government—*i.e.*, a "fine"—has a statute of limitations, as does a remedial compensatory judgment payable to injured investors. Pet. Br. 44. But per the SEC, *no*

limitations period applies to a remedy that is right in between: A judgment that is (says the SEC) remedial, but payable to the government. *Id.* Petitioner's brief asked: Why would that be? *Id.*

The SEC's feeble response: because it was "Congress's decision." SEC Br. 48-49. This assumes the answer to the question presented, which is whether Congress' enactment—§2462—excludes disgorgement. The SEC's inability to articulate any rational basis for its position beyond the *ipse dixit* that it was "Congress's decision" underscores that its position is wrong.

IV. THE CANON OF NARROW CONSTRUCTION DOES NOT APPLY.

The SEC relies on the canon that statutes of limitations are construed narrowly against the government. SEC Br. 49-51.

But as Petitioner explained, that canon applies where the government vindicates its *own* property rights, given the "public policy of preserving the public rights, revenues, and property from injury and loss by the negligence of public officers." Pet. Br. 46 (quoting *Guaranty Trust Co. of New York v. United States*, 304 U.S. 126, 132 (1938)). The SEC asserts that Petitioner's contention is inconsistent with the canon's "rationale," which "rests on the government's sovereignty." SEC Br. 49. But it does not cite *Guaranty Trust*, which rejects that rationale. 304 U.S. at 132 (although the canon is "a vestigial survival of the prerogative of the Crown, ... the source of its continuing vitality where the royal privilege no longer exists is to be found in the public policy now underlying the rule even though it may

in the beginning have had a different policy basis").

History proves the point: the canon has apparently *never* applied when the government was not vindicating its own property rights. The SEC suggests *Baldaracco v. Commissioner*, 464 U.S. 386 (1984), involved penalties, but *Baldaracco*'s rule addressed "limitations statutes barring the collection of taxes otherwise due and unpaid." *Id.* at 392 (quotation marks omitted).

Moreover, as Petitioner explained (Pet. Br. 47-48), the Court has repeatedly *not* applied this canon in government enforcement actions. The SEC distinguishes those cases on the ground that they involved "penal" remedies. SEC Br. 50. But *Maillard*—involving a customs forfeiture closely similar to disgorgement—also explicitly declined to apply this canon. 26 F. Cas. at 1142. Moreover, the SEC's contention contradicts its thesis that the narrow-construction canon applies to *all* government suits.

The SEC's position boils down to this: by inventing the new implied remedy of "disgorgement," the SEC avoids all statutes of limitations—because no existing limitations period expressly utters the word "disgorgement." The Court should reject this untenable position and apply §2462.

CONCLUSION

The judgment of the Tenth Circuit should be reversed.

Respectfully submitted,

CLINTON W. MARRS
MARRS GRIEBEL LAW, LTD.
1000 Gold Ave, SW
Albuquerque, NM 87102
(505) 433-3926
clinton@marrslegal.com

DAVID A. STRAUSS
SARAH M. KONSKY
JENNER & BLOCK SUPREME COURT AND APPELLATE CLINIC AT THE UNIVERSITY OF CHICAGO LAW SCHOOL
1111 E. 60th Street
Chicago, IL 60637
(773) 834-3189

ADAM G. UNIKOWSKY
Counsel of Record
ZACHARY C. SCHAUF
JENNER & BLOCK LLP
1099 New York Ave., NW,
Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

JAMES DAWSON
JENNER & BLOCK LLP
353 N. Clark St
Chicago, IL 60654

RECORD AND BRIEFS

FILED
MAR - 3 2017
OFFICE OF THE CLE
SUPREME COURT, U.

No. 16-529

In the Supreme Court of the United States

CHARLES R. KOKESH,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR THE AMERICAN INVESTMENT COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

JASON MULVIHILL
AMERICAN INVESTMENT COUNCIL
799 9th Street, NW
Suite 200
Washington DC, 20001

LEWIS J. LIMAN
Counsel of Record
DANIEL D. QUEEN
LUCAS D. HAKKENBERG
CLEARY GOTTLIEB STEEN & HAMILTON LLP
One Liberty Plaza
New York, New York 10006
(212) 225-2000
lliman@cgsh.com

Counsel for Amicus Curiae

March 3, 2017

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF THE ARGUMENT 3

ARGUMENT 6

I. 28 U.S.C. § 2462 PROTECTS PARTIES' SETTLED EXPECTATIONS AGAINST GOVERNMENTAL ENFORCEMENT ACTIONS SEEKING TO PUNISH CONDUCT FROM TIME IMMEMORIAL. 6

II. THE GOVERNMENT'S POSITION WOULD GIVE THE SEC VIRTUALLY LIMITLESS POWER TO EXTRACT PERPETUAL FINES, PENALTIES, OR FORFEITURES 8

A. SEC Disgorgement Is an Extraordinary Punitive Power Akin to a "Fine, Penalty, or Forfeiture" and Is Not Subject to Limits on Traditional Restitution Remedies 9

TABLE OF CONTENTS (cont'd)

Page

B. Left Unchecked by § 2462, the SEC's Disgorgement Power Is Subject to Governmental Overreach and Would Allow the SEC to Extract Enormous Penalties in Perpetuity 16

CONCLUSION 24

TABLE OF AUTHORITIES

Page

Cases

Adams v. Woods,
2 Cranch 336 (1805) 6, 18

FDIC v. Maxxam, Inc.,
523 F.3d 566 (5th Cir. 2008) 20

FTC v. Bronson Partners, LLC,
654 F.3d 359 (2d Cir. 2011) 12

Gabelli v. SEC,
133 S. Ct. 1216 (2013) ..... *passim*

Great-W. Life & Annuity Ins. Co. v. Knudson,
534 U.S. 204 (2002) 11

Halstead v. Grinnan,
152 U.S. 412 (1894) 15

Holmberg v. Armbrecht,
327 U.S. 392 (1946) 15

Morrison v. Olson,
487 U.S. 654 (1985) 20

Official Comm. of Unsecured Creditors of WorldCom, Inc. v. SEC, 467 F.3d 73 (2d Cir. 2006) 4, 9

TABLE OF AUTHORITIES (cont'd)

Page

Order of R.R. Telegraphers v. Ry. Express Agency, Inc., 321 U.S. 342 (1944) 6-7

Reynolds Metals Co. v. Ellis, 202 F.3d 1246 (9th Cir. 2000) 16

Rotella v. Wood, 528 U.S. 549 (2000) 7

SEC v. Commonwealth Chem. Sec., Inc., 574 F.2d 90 (2d Cir. 1978) 9

SEC v. Contorinis, 743 F.3d 296 (2d Cir. 2014) 11-12, 14

SEC v. Frohling, __ F.3d __, No. 13-3191, 2016 WL 7093925 (2d Cir. Dec. 6, 2016) 9

SEC v. Mantria Corp., No. 09-02676, 2011 WL 3439348 (D. Colo. Aug. 5, 2011) 16

SEC v. Monterosso, 756 F.3d 1326 (11th Cir. 2014) 14

SEC v. Pentagon Capital Mgmt. PLC, 725 F.3d 279 (2d Cir. 2013) 14

TABLE OF AUTHORITIES (cont'd)

Page

SEC v. Pimco Advisors Fund Mgmt. LLC,
341 F. Supp. 2d 454 (S.D.N.Y. 2004) 21

SEC v. Platforms Wireless Int'l Corp.,
617 F.3d 1072 (9th Cir. 2010) 14

SEC v. Quan,
817 F.3d 583 (8th Cir. 2016) 11

SEC v. Warde,
151 F.3d 42 (2d Cir. 1998) 14

SEC v. Wyly,
No. 10-05760 (S.D.N.Y. Feb. 26, 2015) 16

Upton v. SEC,
75 F.3d 92 (2d Cir. 1996) 21-22

Statutes

15 U.S.C. § 7246(a) 13

28 U.S.C. § 2462 ..... *passim*

17 C.F.R. § 201.1100 13

17 C.F.R. § 201.1102(b) 13

TABLE OF AUTHORITIES (cont'd)

Page

Other Authorities

Andrew Ceresney, Director of Enforcement, *Securities Enforcement Forum West 2016 Keynote Address: Private Equity Enforcement* (May 21, 2016), https://www.sec.gov/news/speech/private-equity-enforcement.html 22

Br. of SEC, *Martin v. SEC*, 734 F.3d 169 (2d Cir. 2013) (No. 11-3011), 2012 WL 8126225 10

Br. of SEC, *SEC v. AMX Int'l, Inc.*, 7 F.3d 71 (5th Cir. 1993) (No. 92-1376), 1992 WL 12127856 10

Br. of SEC, *SEC v. Custable*, 796 F.3d 653 (7th Cir. 2015) (No. 15-1442), 2015 WL 3383280 10

Br. of SEC, *SEC v. Silverman*, 328 F. App'x 601 (11th Cir. 2009) (No. 08-16710-FF), 2009 WL 1674430 15

Br. of SEC, *SEC v. Smyth*, 420 F.3d 1225 (11th Cir. 2005) (No. 04-11985), 2004 WL 4802488 10

TABLE OF AUTHORITIES (cont'd)

Page

In the Matter of Artis Capital Mgmt., L.P. & Michael W. Harden, Inv. Advisers Act Release No. 4550 (Oct. 13, 2016) 12-13

In the Matter of Bear, Stearns & Co., Inc., Sec. Act Release No. 8668 (Mar. 16, 2006)..... 21

In the Matter of General Cable Corp., Exch. Act Release No. 79703 (Dec. 29, 2016) 12

In the Matter of Itg Inc. & Alternet Sec., Inc., Admin. Proc. File No. 3-16742, Sec. Act Release No. 9887 (Aug. 12, 2015) 13

In the Matter of Total, S.A., Exch. Act Release No. 39654 (May 29, 2013)..... 12, 13

Mark T. Roche et al., *Will the SEC Have Forever to Pursue Securities Violations?: SEC v. Gabelli*, 44 Sec. Reg. & L. Rep. 1415 (2012) 21

Press Release, SEC, Enforcement Director Andrew J. Ceresney to Leave SEC (Dec. 8, 2016), https://www.sec.gov/news/pressrelease/2016-259.html 10

TABLE OF AUTHORITIES (cont'd)

Page

Restatement (3d) of Restitution & Unjust Enrichment (Am. Law Inst. 2011) 11

SEC Div. of Enforcement, *Enforcement Manual* (2012) 7

SEC Div. of Enforcement, *Enforcement Manual* (2016), *https://www.sec.gov/divisions/enforce/enforcementmanual.pdf* 19

SEC, *FY 2015 Annual Performance Report*, https://www.sec.gov/about/reports/sec-fy2015-fy2017-annual-performance.pdf 13-14

SEC, *Report Pursuant to Section 308(C) of the Sarbanes Oxley Act of 2002*, (2003) 9-10

SEC v. O'Meally, Trial Tr., No. 06-06483 (S.D.N.Y. Jan. 9, 2012), ECF No. 185 21

Select SEC and Market Data 2009 (Nov. 16, 2009), https://www.sec.gov/about/secstats 2009.pdf 17

Select SEC and Market Data 2012 (Feb. 6, 2013), https://www.sec.gov/about/secstats 2012.pdf 17-18

TABLE OF AUTHORITIES (cont'd)

Page

Select SEC and Market Data 2013 (Feb. 7, 2014), https://www.sec.gov/reportspubs/select-sec-and-market-data/secstats2013.pdf 17

Select SEC and Market Data Fiscal 2015 (Feb. 5, 2016), https://www.sec.gov/reportspubs/select-sec-and-market-data/secstats2015.pdf 17

Select SEC and Market Data Fiscal 2016 (Jan. 18, 2017), https://www.sec.gov/reportspubs/select-sec-and-market-data/secstats2016.pdf 17

Strengthening the SEC's Vital Enforcement Responsibilities: Hearing Before the Subcomm. on Sec., Ins. & Inv. of the Senate Comm. on Banking, Housing & Urban Affairs, 111th Cong. 46 (2009) 18

INTEREST OF *AMICUS CURIAE*[1]

The American Investment Council ("AIC") is an advocacy, communications, and research organization devoted to advancing access to capital, job creation, retirement security, innovation, and economic growth in the United States by promoting responsible long-term investment. Formerly known as the Private Equity Growth Capital Council, the AIC was established in 2007, and its members include the world's leading private equity and growth capital firms. The AIC's members are united by their commitment to growing and strengthening the businesses in which they invest. Pursuant to its mission, the AIC develops, analyzes, and distributes information about the private equity and growth capital industry and its contributions to the U.S. and global economy. The AIC advocates for sound public policies before the Securities and Exchange Commission ("SEC"), Congress, and the courts, including by submitting amicus curiae briefs in cases raising legal issues important to the private investment industry.

---

[1] No counsel for a party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties to this matter have consented to submission of this brief.

The issue presented in this case—whether the five-year statute of limitations period imposed by 28 U.S.C. § 2462 for "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture" includes disgorgement actions brought by the SEC—is of particular importance to the AIC and its members. Private equity funds and their portfolio companies are subject to extensive regulations under the federal securities laws. In order to conduct business responsibly and make appropriate investments on behalf of their investors, AIC members have an interest in repose and require certainty about the potential liabilities that they and their portfolio companies may face in the future. The applicability of 28 U.S.C. § 2462 to the SEC's disgorgement actions promotes that certainty.

Therefore, the AIC respectfully submits that the Circuit Court's decision should be reversed, as it grants the SEC inappropriately expansive powers to extract "fine[s], penalt[ies], and forfeiture[s]" in contravention to 28 U.S.C. § 2462 and is inconsistent with the Court's decision in *Gabelli v. SEC*, 133 S. Ct. 1216 (2013). Moreover, because the Circuit Court's decision would give the SEC the power to extract punitive disgorgement against a party for conduct no matter how far in the past, it also upsets private parties' settled expectations and creates potentially chilling uncertainty as to the finality of transactions.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Pursuant to 28 U.S.C. § 2462, "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture" is subject to a five-year statute of limitations period. Four years ago, in *Gabelli v. SEC*, 133 S. Ct. 1216 (2013), this Court addressed the question of whether this limitations period ran from the date the defendant's conduct occurred, or whether—as the SEC argued—the limitations period began at some later, undefined date when the SEC "discovered" the underlying conduct. In a unanimous opinion, the Court rejected the SEC's argument, emphasizing that the SEC's reading of § 2462 would violate the core purpose of statutes of limitations: to provide certainty that parties will not be liable for stale claims, particularly where the evidence needed to prove such claims may no longer exist. *Gabelli*, 133 S. Ct. at 1221.

In *Gabelli*, the Court recognized that where the plaintiff was a "defrauded victim" herself, the "discovery rule" would apply. *Id.* at 1221. However, it refused to extend that exception to SEC enforcement actions, where the SEC's role is not to ensure that the "injured receive recompense," but to "punish[] and label defendants [as] wrongdoers" and to deter others from violating the law. *Id.* at 1223. In this context—where the SEC is neither a victim nor standing in the shoes of a victim, but rather "a prosecutor seeking

penalties"—the Court recognized the necessity of time limits so as to create certainty and avoid exposing parties "to Government enforcement action not only for five years after their misdeeds, but for an additional uncertain period into the future." *Id.* at 1223-24.

So it is here. The SEC does not exercise its disgorgement powers solely, or even primarily, to recover a loss to itself or to injured victims. Rather, "the SEC's purpose in seeking disgorgement of ill-gotten profits has always been deterrence," not the compensation of victims. *Official Comm. of Unsecured Creditors of WorldCom, Inc. v. SEC*, 467 F.3d 73, 83 (2d Cir. 2006) (Sotomayor, J.). In recent years, disgorgement has proven to be an ever-more powerful weapon in the SEC's enforcement arsenal. It has been utilized at a rate that outstrips the civil penalties that the SEC also levies. Consistent with its punitive character, the SEC's disgorgement power is not limited in the manner that traditional equitable remedies brought by private plaintiffs are limited: the SEC need not (1) identify any victims at all (indeed, no victims need even exist), (2) trace the disgorged funds to any unlawfully-obtained assets, or (3) prove that the defendant ever actually possessed the assets the SEC is requiring them to disgorge. Moreover, because the true purpose of its disgorgement power is not to compensate victims, but rather to deter, the SEC has discretion to determine how to dispose of disgorged assets, and it

frequently transfers those assets to the U.S. Treasury and not to any victim at all.

To allow the SEC to wield this extraordinary power for conduct that occurred at "any distance of time"—not to compensate victims, but "to punish, and label defendants [as] wrongdoers," *Gabelli*, 133 S. Ct. at 1223 (citation omitted)—would be detrimental to the just and timely enforcement of our securities laws and the functioning of our nation's securities markets. Allowing the SEC to punish aged conduct would undermine faith in those markets by unsettling parties' expectations about the finality of their transactions—including transactions which conformed to market standards at the time—increasing uncertainty as to counterparties' future liabilities, and raising the specter of open-ended prosecution for past conduct. The SEC would be empowered to present market participants with a Hobson's choice: pay whatever penalty the SEC seeks, or face monetary sanctions (including disgorgement) for conduct going back as far as the SEC desires. The SEC could threaten that if the defendant failed to "pay up," it would face a damaging, costly, and lengthy investigation extending back years, including into conduct as to which the exonerating or mitigating evidence had vanished due to the passage of time. Just as with sanctions formally styled "penalties," the disgorgement power the SEC exercises allows it to extract a "fine, penalty, or forfeiture" and should, therefore, be constrained by 28 U.S.C. § 2462's five-year limitations period.

ARGUMENT

I. 28 U.S.C. § 2462 Protects Parties' Settled Expectations Against Governmental Enforcement Actions Seeking to Punish Conduct From Time Immemorial.

In refusing to weaken the five-year limitations period in 28 U.S.C. § 2462, the Court's opinion in *Gabelli* reaffirmed Chief Justice Marshall's warning that "it 'would be utterly repugnant to the genius of our laws' if actions for penalties could 'be brought at any distance of time.'" S. Ct. at 1223 (quoting *Adams v. Woods*, 2 Cranch 336, 342 (1805)). The Court cautioned about the potential abuses and disruptions that would occur if "defendants [were] exposed to Government enforcement action not only for five years after their misdeeds, but for an additional uncertain period into the future." *Id.* at 1223.

For one, if the government could hold defendants liable for events that have long since passed, their settled expectations would be disrupted. Statutes of limitations serve a salutary purpose. As the Court explained, "even wrongdoers are entitled to assume that their sins may be forgotten," and defendants' ability to do so lends "security and stability to human affairs." *Id.* at 1221 (citations omitted). Further, absent appropriate limitations periods, targets of government enforcement actions would be disabled from defending themselves, being "surprise[d]

through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Id.* (quoting *Order of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944)). Thus, by interpreting § 2462 to bar the SEC's claims, the Supreme Court "set[] a fixed date when exposure to the specified Government enforcement efforts ends, advancing 'the basic policies of all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities.'" *Id.* (quoting *Rotella v. Wood*, 528 U.S. 549, 555 (2000)).

The *Gabelli* decision highlighted the difference between government enforcement actions to promote adherence to law and private actions to compensate injured victims. The Court explained that a "discovery rule" lengthening the limitations period may be appropriate for suits by *victims*, who generally "do not live in a state of constant investigation" and therefore may delay in discovering a fraud perpetrated against them. *Id.* at 1222. In contrast, "a central 'mission' of the [SEC] is to 'investigat[e] potential violations of the federal securities laws,'" and "it has many legal tools at hand to aid in that pursuit," including powers to compel the production of information, award whistleblowers, and enter into cooperation agreements. *Id.* (quoting SEC, Div. of Enforcement, *Enforcement Manual* (2012)).

Moreover, the SEC "is not only a different kind of plaintiff, it seeks a different kind of relief." *Id.* at 1223. When victims bring suit, they seek compensation from a defendant to "restore the status quo" that existed prior to their injury, and extending the statute of limitations in those cases may help to "ensure that the injured receive [that] recompense." *Id.* (citations omitted). However, the purpose of governmental enforcement actions necessarily goes beyond "ensur[ing] that the injured receive recompense." They are designed to deter and to "punish, and label defendants wrongdoers." *Id.*

In short, § 2462 rests upon fundamental concerns underlying all statutes of limitations, including the need to respect settled expectations and the loss of evidence. As used by the SEC, disgorgement goes "beyond compensation," serving primarily as a tool to punish wrongdoing—not to return victims to their status quo. It is therefore precisely the type of "fine, penalty, or forfeiture" that concerned the Court in *Gabelli*.

II. The Government's Position Would Give the SEC Virtually Limitless Power to Extract Perpetual Fines, Penalties, or Forfeitures.

The SEC's disgorgement power is an extraordinary punitive remedy in the character of a "fine, penalty, or forfeiture," and the SEC's interpretation of § 2462 would allow it to extend

the use of that remedy back through time, gutting *Gabelli's* exhortations against perpetual penalties. The SEC's position should therefore be rejected.

A. SEC Disgorgement Is an Extraordinary Punitive Power Akin to a "Fine, Penalty, or Forfeiture" and Is Not Subject to Limits on Traditional Restitution Remedies.

Courts have repeatedly recognized that "the SEC's purpose in seeking disgorgement of ill-gotten profits has always been deterrence," not the compensation of victims. *Official Comm. of Unsecured Creditors of WorldCom, Inc. v. SEC*, 467 F.3d 73, 83 (2d Cir. 2006) (Sotomayor, J.); *see also, e.g., SEC v. Frohling*, __ F.3d __, No. 13-3191, 2016 WL 7093925, at *4 (2d Cir. Dec. 6, 2016) ("The primary purpose of disgorgement as a remedy for violation of the securities laws is to deprive violators of their ill-gotten gains, thereby effectuating the deterrence objectives of those laws.") (quotation marks and citation omitted); *SEC v. Commonwealth Chem. Sec., Inc.*, 574 F.2d 90 (2d Cir. 1978) (Friendly, J.) ("[T]he primary purpose of disgorgement is not to compensate investors.").

Likewise, the SEC itself has repeatedly acknowledged that its disgorgement power is not "intended to make investors whole," but rather "to deprive the wrongdoer of their ill-gotten gain." SEC, *Report Pursuant to Section 308(C) of the*

Sarbanes Oxley Act of 2002, at 3 n.2 (2003). In fact, the SEC has consistently relied on this point throughout decades of litigation—including to argue that investors have no standing to challenge an SEC decision not to distribute disgorged funds to victims. *See, e.g.*, Br. of SEC at *24, *SEC v. Custable*, 796 F.3d 653 (7th Cir. 2015) (No. 15-1442), 2015 WL 3383280 ("The purpose of disgorgement . . . is depriving wrongdoers of their ill-gotten gains—*not* satisfying creditors or repaying investors.") (quotation marks and citation omitted); Br. of SEC at *4, *Martin v. SEC*, 734 F.3d 169 (2d Cir. 2013) (No. 11-3011), 2012 WL 8126225 ("Compensation to injured investors is 'a distinctly secondary goal.'") (citation omitted); *see also* Br. of SEC at *41, *SEC v. Smyth*, 420 F.3d 1225 (11th Cir. 2005) (No. 04-11985), 2004 WL 4802488 ("In contrast to the compensatory purpose of damages in private actions, . . . the purpose of disgorgement in [SEC] actions is to prevent unjust enrichment and to deter future violations."); Br. of SEC at *13, *SEC v. AMX Int'l, Inc.*, 7 F.3d 71 (5th Cir. 1993) (No. 92-1376), 1992 WL 12127856 ("[T]he purpose [of disgorgement] is to remove ill-gotten gains from wrongdoers, and deter future violations."); *see also* Press Release, SEC, Enforcement Director Andrew J. Ceresney to Leave SEC (Dec. 8, 2016) (referring to $13.8 billion in disgorgements and civil penalties as "monetary sanctions").[2]

---

[2] https://www.sec.gov/news/pressrelease/2016-259.html.

Consistent with this punitive and non-compensatory intent, when the SEC sues for disgorgement, it does not stand in the shoes of an injured party, subjecting itself to the burdens and defenses of a person in that position. Rather, the SEC's disgorgement power is designed for law enforcement, and is thus unbound by many of the traditional limits of equitable actions for restitution to which injured private parties are subject.

No tracing required. For instance, "[f]or restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession." *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 214 (2002). Thus, when seeking equitable restitution, a plaintiff may only recover money or property that can "*clearly be traced* to particular funds or property" possessed by the defendant. *Id.* at 213 (emphasis added); *see also Restatement (3d) of Restitution & Unjust Enrichment* § 51, cmt. e (Am. Law Inst. 2011) (accounting and traditional disgorgement require showing "what portion of the defendant's assets or income is properly attributable to the underlying wrong to the claimant"); *id.* § 55(1) (constructive trust allows recovery of "identifiable property . . . and its traceable product"). In contrast, the SEC's power to disgorge is "not limited to specific assets traced back to a violation." *SEC v. Quan*, 817 F.3d 583, 594 (8th Cir. 2016); *see also SEC v. Contorinis*, 743 F.3d 296, 303 n.3 (2d Cir. 2014) ("[W]e have long

deemed specific tracing unnecessary in ordering disgorgement for securities fraud.") Because the primary goal of SEC disgorgements is to deter future violations, not to return assets to victims, there need not be a precise connection between the disgorged assets and any victims' loss.

No need to identify any victims. In contrast to a traditional restitution action—which would be brought by a party that suffered a loss, or someone acting directly on their behalf—the SEC does not need to identify any specific victim who suffered a loss, or even that there are victims at all, when seeking disgorgement. *See, e.g., FTC v. Bronson Partners, LLC*, 654 F.3d 359, 373 (2d Cir. 2011) ("[A] regulatory agency seeking disgorgement need not identify specific victims to whom payment is due . . . , as it would be required to do if seeking to impose a constructive trust."). For example, the SEC has disgorged millions of dollars from defendants for violations of the Foreign Corrupt Practices Act without even alleging that anyone was harmed by those violations. *See, e.g., In the Matter of Total, S.A.*, Exch. Act Release No. 39654 (May 29, 2013) (disgorging $153 million for FCPA violation); *In the Matter of General Cable Corp.*, Exch. Act Release No. 79703 (Dec. 29, 2016) ($51 million disgorgement). Likewise, the SEC has ordered disgorgements in insider trading cases without alleging that investors lost money due to the relevant violations. *See, e.g., In the Matter of Artis Capital Mgmt., L.P. & Michael W. Harden*, Inv. Advisers Act Release No. 4550 (Oct. 13, 2016)

($5.1 million disgorgement amount for insider trading).

Funds need not be returned to victims. The SEC need never return disgorged funds to victims, either because the SEC has not identified any individual who has suffered a harm, or because the SEC determines that, in its opinion, the cost of distributing the funds to victims is too high. *See* 17 C.F.R. § 201.1102(b); *see also, e.g.*, *Total*, Exch. Act Release No. 39654, at 11 (disgorged amount paid to "the United States Treasury"); *Artis Capital*, Inv. Advisors Release No. 4550, at 9 (same); *In the Matter of Itg Inc. & Alternet Sec., Inc.*, Admin. Proc. File No. 3-16742, Sec. Act Release No. 9887 (Aug. 12, 2015) (ordering $2 million disgorgement to the Treasury for misuse of customer information). Indeed, the SEC may establish a Fair Fund to compensate victims with disgorged amounts only if it "also assess[es] a civil money penalty." 17 C.F.R. § 201.1100.[3] As a result, many of the funds disgorged by the SEC are never used to compensate victims; for instance, between 2013 and 2015, the SEC collected $6.8 billion in disgorgement and penalties, but only distributed $833 million in Fair Funds to investors. SEC, *FY 2015 Annual*

---

[3] Civil monetary penalties, like disgorgements, may be distributed to victims, 15 U.S.C. § 7246(a), which provides further evidence that disgorgements are not intended to be any more compensatory or any less punitive than civil penalties.

Performance Report, at 40-41, https://www.sec.gov/about/reports/sec-fy2015-fy2017-annual-performance.pdf.

Defendants not necessarily enriched. Further, the SEC can disgorge funds from defendants who were not themselves enriched. Thus, the SEC requires insider traders to disgorge profits realized by others as a result of the traders' unlawful trading or tipping. *See, e.g., Contorinis*, 743 F.3d at 301-02 (holding insider trader responsible to disgorge profits he did not personally realize); *SEC v. Warde*, 151 F.3d 42, 49 (2d Cir. 1998) ("A tippee's gains are attributable to the tipper, regardless whether benefit accrues to the tipper."). The SEC can also require wrongdoers to disgorge the profits of their collaborators in a fraud, irrespective of whether the defendant ever possessed those profits personally. *See, e.g., SEC v. Pentagon Capital Mgmt. PLC*, 725 F.3d 279, 288 (2d Cir. 2013) (finding "no statutory requirement that a disgorgement award be measured as to each individual defendant" and that "joint and several liability for combined profits on collaborating . . . parties is appropriate") (citation and quotation marks omitted); *SEC v. Monterosso*, 756 F.3d 1326, 1337-38 (11th Cir. 2014) ("'[A] personal financial benefit' is not a 'prerequisite for joint and several liability.'") (per curiam) (quoting *SEC v. Platforms Wireless Int'l Corp.*, 617 F.3d 1072, 1098 (9th Cir. 2010)).

Laches may not apply. Finally, restitution and other equitable actions available to private victims respect the settled expectations of the wrongdoer and victim alike through the principle of laches. *See Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946); *see also Halstead v. Grinnan*, 152 U.S. 412, 416 (1894) (laches "prevents the breaking up of relations and situations long acquiesced in"). Therefore, the private law honors the finality of transactions and provides "security and stability to human affairs," *Gabelli*, 133 S. Ct. at 1221, by treating as settled the allocation of rights that have been openly and knowingly acquiesced to by the parties. By contrast, the SEC claims its disgorgement power is not subject to laches. *See, e.g.*, Br. of SEC at *19-20, *SEC v. Silverman*, 328 F. App'x 601 (11th Cir. 2009) (No. 08-16710-FF), 2009 WL 1674430. Thus, under the SEC's theories, the SEC could reach back far in time to strip a party of property which it believed to be ill-gotten even if the party that parted with the property knowingly acquiesced to its taking years earlier. Indeed, under its theories, the SEC could pursue disgorgement and unsettle transactions even if the putatively injured victim did not want the property, knowingly disclaimed any interest in the property, or simply did not believe it was victimized.

Thus, the power the SEC claims to exercise in this case goes far beyond what it would have been permitted to use if it were standing in the shoes of an injured victim. Its function is not "recompense" of an "injured victim"; rather, it is law enforcement.

Gabelli, 133 S. Ct. at 1224. Just like the remedy styled a penalty in *Gabelli*, disgorgement functions as a "fine, penalty or forfeiture" and is subject to the limitations imposed on fines, penalties, and forfeitures. *See supra* at 7-8; *see also Reynolds Metals Co. v. Ellis*, 202 F.3d 1246, 1248 (9th Cir. 2000) ("[I]t is clear that a court must look to the substance of the remedy sought, . . . rather than the label placed on that remedy.") (quotation marks and citation omitted).

B. Left Unchecked by § 2462, the SEC's Disgorgement Power Is Subject to Governmental Overreach and Would Allow the SEC to Extract Enormous Penalties in Perpetuity.

Even when constrained by a five-year statute of limitations, the SEC's existing disgorgement power—unchecked by traditional limitations on equitable restitution—is an extraordinarily punitive remedy. The breadth of the disgorgement power has allowed the SEC to disgorge enormous sums from individual defendants, often dwarfing the civil penalties that are applied. *See, e.g.*, *SEC v. Wyly*, No. 10-05760 (S.D.N.Y. Feb. 26, 2015) ($100 million disgorgement to Treasury with no penalty); *SEC v. Mantria Corp.*, No. 09-02676, 2011 WL 3439348 (D. Colo. Aug. 5, 2011) ($37 million disgorgement to the SEC with a $500,000 penalty).

Taken in the aggregate, the SEC has collected billions of dollars in disgorged funds annually, and

in recent years, the SEC's total disgorgement awards have been more than twice the total amounts of its civil penalties. *See, e.g.*, *Select SEC and Market Data Fiscal 2016* (Jan. 18, 2017) at 2 (reporting disgorgement of $2.8 billion and civil penalties of $1.3 billion for fiscal year 2016);[4] *Select SEC and Market Data Fiscal 2015* (Feb. 5, 2016) at 2 (reporting disgorgement of $3.0 billion and civil penalties of $1.2 billion for fiscal year 2015).[5] Moreover, in the years since *Gabelli*, the growth in disgorgement awards has outstripped the growth of civil monetary penalties, which grew at over 24% and 9%, respectively, between 2013 and 2016.[6]

---

[4] https://www.sec.gov/reportspubs/select-sec-and-market-data/secstats2016.pdf.

[5] https://www.sec.gov/reportspubs/select-sec-and-market-data/secstats2015.pdf.

[6] *Compare Select SEC and Market Data 2013* (Feb. 7, 2014) at 2, https://www.sec.gov/reportspubs/select-sec-and-market-data/secstats2013.pdf (reporting disgorgement of $2.257 billion and penalties of $1.167 billion) *with Select SEC and Market Data 2016* (Jan. 18, 2017) at 2, https://www.sec.gov/reportspubs/select-sec-and-market-data/secstats2016.pdf (reporting disgorgement of $2.809 billion and penalties of $1.273 billion). By contrast, a comparison of fiscal years 2009 and 2012—the years between the 2008 financial crises and the *Gabelli* decision—reveal a threefold increase in penalty awards, while disgorgement stayed flat. *Compare Select SEC and Market Data 2009* (Nov. 16, 2009) at 2, https://www.sec.gov/about/secstats2009.pdf (disgorgement of $2.09 billion and penalties of $345 million) *with Select SEC and Market Data 2012* (Feb. 6, 2013) at 2,

If the Court were to hold that 28 U.S.C. § 2462 does not apply to SEC disgorgement actions at all, this already extraordinary power would be rendered even more extraordinary, giving the SEC the power to pursue putative wrongdoers' profits and to unsettle transactions going back decades or more, simply because it saw a law enforcement interest in doing so. Such a result would not only be inimical to what Chief Justice Marshall described as the "genius of our laws," *Adams v. Woods*, 2 Cranch 336, 342 (1805), but it would effectively gut *Gabelli* by allowing the government to investigate (or threaten to investigate) and sue on aged conduct to which the parties have long since acquiesced.

The SEC itself has acknowledged that the federal securities laws are at their most effective and fair when administrated quickly. Delay undermines both the deterrence value and the public perception that enforcement is fair. *See Strengthening the SEC's Vital Enforcement Responsibilities: Hearing Before the Subcomm. on Sec., Ins. & Inv. of the Senate Comm. on Banking, Housing & Urban Affairs*, 111th Cong. 46 (2009) (former Director of the SEC's Enforcement Division noting that "[a] sense of urgency is critical. If cases are unreasonably delayed, if there is a wide gap between conduct and atonement, then the message

---

https://www.sec.gov/about/secstats2012.pdf (disgorgement of $2.083 billion and penalties of $1.021 billion).

[] to the investing public that the SEC is vigilant is . . . diluted."); *see also* SEC Div. of Enforcement, *Enforcement Manual* §3.1.1 (2016), https://www.sec.gov/divisions/enforce/enforcementmanual.pdf ("Swift investigations generally are most effective and enhance the public interest.").

The rule the SEC now proposes, however, would not only dilute the perceptions that the securities laws are administered fairly, but would give the government overwhelming leverage to force putative defendants to settle claims as to which they have good defenses, or otherwise settle on unfair terms. The SEC could reach back and use the threat of disgorgement to extract settlements with higher penalties or more serious charges, or alternatively agree to lower penalties in exchange for higher disgorgement amounts. The SEC could also use this power simply to extract monetary sanctions for long-past conduct. Few defendants would be able to resist an SEC settlement related to more recent conduct, even if they never violated the law or had good and viable defenses, if the alternative was an open-ended SEC investigation into their entire operating history. The SEC could simply deliver the message to the intransigent defendant: pay, or else.

And, because the SEC—unlike the threatened private party—has as its "central 'mission'" the task of collecting and maintaining (often in secret) evidence of potential securities law violations, *Gabelli*, 133 S. Ct. at 1222, its threat would be real.

The SEC "has many legal tools at hand to aid in that pursuit," including powers to compel the production of information, award whistleblowers, and enter into cooperation agreements. *Id.* ("[E]ven without filing suit, it can subpoena any documents and witnesses it deems relevant . . . ."). It thus would be able to take advantage of the passage of time to bring actions when "evidence has been lost, memories have faded, and witnesses have disappeared." *Id.* at 1221 (quotation marks and citation omitted).

Indeed, under the SEC's theory, without any current or recent violation at all, it could reach back indefinitely to punish conduct that at one time was acquiesced in or was widely known and accepted but later fell out of favor, simply because it wanted to or felt media or political pressure to do so. Courts have warned against just such a possibility. *See, e.g., Morrison v. Olson*, 487 U.S. 654, 728 (1988) (Scalia, J., dissenting) ("Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than cases that need to be prosecuted.") (citation omitted); *see also FDIC v. Maxxam, Inc.*, 523 F.3d 566, 571-573 (5th Cir. 2008) (describing intense political pressure placed on the FDIC to file an action against the executive of a failed savings-and-loan).

Even setting aside the fairness of such an approach to defendants, the SEC's proposed enforcement power would not be to the benefit of

investors. Market participants would be perpetually uncertain as to whether the SEC would reconsider the validity of specific market practices years after the fact. Indeed, *Gabelli* is an example of the SEC undertaking just such a retroactive determination. That case alleged illegal "market timing" of mutual funds, *Gabelli*, 133 S. Ct. at 1219, which had been a widespread practice that the SEC had previously chosen not to prosecute.[7] *See* Mark T. Roche et al., *Will the SEC Have Forever to Pursue Securities Violations? SEC v. Gabelli*, 44 Sec. Reg. & L. Rep. 1415, at 2 n.3 (2012) (quoting SEC's stipulation in *SEC v. O'Meally*, Trial Tr. at 2186-87, No. 06-06483 (S.D.N.Y. Jan. 9, 2012), ECF No. 185, that "[b]eginning in the mid 1990's, the SEC knew about the practice of market timing in mutual funds, and the decision was to let the marketplace regulate itself"); *see also Upton v. SEC*, 75 F.3d 92, 98 (2d Cir. 1996) (vacating SEC

---

[7] However, following an announcement that the New York State Attorney General was investigating the practice, the SEC changed its mind, bringing investigations and ultimately a number of actions against alleged market timers many years after the fact. *See* Mark T. Roche et al., *Will the SEC Have Forever to Pursue Securities Violations? SEC v. Gabelli*, 44 Sec. Reg. & L. Rep. 1415, at 2 n.3 (July 23, 2012); *see also In the Matter of Bear, Stearns & Co., Inc.*, Sec. Act Release No. 8668 (Mar. 16, 2006) (settling administrative proceeding concerning market timing practices arising in the late 1990s and early 2000s); *SEC v. Pimco Advisors Fund Mgmt. LLC*, 341 F. Supp. 2d 454, 461 (S.D.N.Y. 2004) (refusing to dismiss SEC suit for market timing violations).

order because the SEC knew the relevant practice "well before the underlying events in this action took place and yet did not publicly condemn it").

More recently, the SEC has turned its attention to conduct in the private equity industry originating more than five years ago. In 2016, the SEC's then-Director of Enforcement tacitly acknowledged this change of focus when dismissing arguments that "it is unfair to charge advisers for disclosure failures in fund organizational documents that were drafted long before the SEC began its focus on private equity" and, indeed, before the 2010 Dodd-Frank Act even required such advisers "to register" with the SEC. Andrew Ceresney, Director of Enforcement, *Securities Enforcement Forum West 2016 Keynote Address: Private Equity Enforcement* (May 21, 2016).[8] The Enforcement Director provided examples of recent SEC actions against private equity firms totaling $59.2 million in disgorgement and $22.3 million in civil penalties, which included conduct well outside the five-year period. *See id.* At the same time, the SEC acknowledged that affected investors could have but chose not to seek relief and recognized that those firms, in fact, provided benefits to their (putatively harmed) investors. *See id.* n.8 (citing example); *see also id.* ("Many investors have invested in private equity based on their

---

8 https://www.sec.gov/news/speech/private-equity enforcement.html.

expectation that private equity returns would be uncorrelated with and/or exceed public equity market returns, and in certain cases, they have been proven correct.").

But under the SEC's theory, the SEC would have the discretion to seek disgorgement not just for conduct in the past five years but as far back as it wished—even if investors were unharmed by the charged conduct (and, indeed, may have believed they were benefited by it). That authority would confer extraordinary powers on the SEC, permitting it to extort settlements and effectively ending the benefit of repose. That power is particularly concerning in the private equity context where the nature of investments are long-term and liability may turn, in part, on disclosures to investors long ago—including those conveyed orally or in emails. *See id.* n.8 (settled action concerning disclosures dating back to 1997). Given this passage of time, the deterioration of evidence would significantly handicap firms in their ability to defend against an SEC action. The application of the *Gabelli* doctrine to SEC disgorgement actions protects market participants by permitting them to invest free from the fear that the government will reach back in time to unsettle transactions on which they relied and as to which there may be no injured party or no one entitled to recompense.

Of course, the rights of injured parties should be respected, and the government is entitled to change its enforcement priorities over time, for example, to

reflect new threats to the securities markets. However, it would not serve those ends to allow the SEC—merely by labeling its practice as equitable disgorgement—to reach back to time immemorial. Rather, this would risk unsettling investors' long-held and relied-upon expectations about any given transactions while simultaneously creating the specter of never-ending liability, harming both the fair administration of the securities laws and the efficient workings of the markets.

CONCLUSION

For the foregoing reasons, the American Investment Council urges the Court to reverse the judgment of the Circuit Court.

JASON MULVIHILL
AMERICAN INVESTMENT COUNCIL
799 9th Street, NW
Suite 200
Washington DC, 20001

LEWIS J. LIMAN
Counsel of Record
DANIEL D. QUEEN
LUCAS D. HAKKENBERG
CLEARY GOTTLIEB STEEN & HAMILTON LLP
One Liberty Plaza
New York, New York 10006
(212) 225-2000
lliman@cgsh.com

Counsel for Amicus Curiae

March 3, 2017

ECORD
AND
RIEFS

No. 16-529

FILED
MAR - 3 2017
OFFICE OF THE CLERK
SUPREME COURT U.S.

In The

Supreme Court of the United States

CHARLES R. KOKESH,

Petitioner,

v.

SECURITIES & EXCHANGE COMMISSION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICUS CURIAE* AMERICANS FOR FORFEITURE REFORM IN SUPPORT OF PETITIONER

MAHESHA P. SUBBARAMAN
Counsel of Record
SUBBARAMAN PLLC
222 S. 9th St., Ste. 1600
Minneapolis, MN 55402
(612) 315-9210
mps@subblaw.com

March 3, 2017

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

Page

Table of Authorities ii

Interest of the *Amicus Curiae* 1

Summary of the Argument 2

Argument 5

I. In considering the Question Presented, the Court can and should address whether the district court was authorized to grant the kind of disgorgement at issue here 5

II. The remedy of disgorgement in this case was subject to 15 U.S.C. § 78u(d)(5), which lets district courts grant "equitable relief" that is "for the benefit of investors" 9

III. The disgorgement granted by the district court did not obey 15 U.S.C. § 78u(d)(5) 16

A. The disgorgement was not "equitable relief"—it was a legal claim to be paid out of Kokesh's general assets 16

B. The disgorgement was not "for the benefit of investors"—it was solely for the government's benefit 19

Conclusion 22

TABLE OF AUTHORITIES

Page

CASES

Botany Worsted Mills v. United States, 278 U.S. 282 (1929) 13

Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 (1989) 1

City of Sherrill v. Oneida Indian Nation of N.Y., 544 U.S. 197 (2005) 6

Great-West Life & Annuity Insurance Co. v. Knudson, 534 U.S. 204 (2002) 10, 12, 14, 19

Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308 (1999) 13

Guaranty Trust Co. v. York, 326 U.S. 99 (1945) 13

Heine v. Levee Comm'rs, 19 U.S. 655 (1874) 8

Huntington v. Attrill, 146 U.S. 657 (1892) 22

Iselin v. United States, 270 U.S. 245 (1926) 7

Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90 (1991) 6

King v. Burwell, 135 S. Ct. 2480 (2015) 22

Marbury v. Madison, 5 U.S. 137 (1803) 8

Marshall v. Vicksburg, 82 U.S. 146 (1872) 1

Mass. Food Ass'n v. Mass. Alcoholic Beverage Control, 197 F.3d 560 (1st Cir. 1999) 9

Montanile v. Bd. of Trs. of the Nat'l Elevator Indus. Health Benefit Plan, 136 S. Ct. 651 (2016) 3, 4, 16, 17, 19

TABLE OF AUTHORITIES – Continued

Page

Montclair v. Ramsdell, 107 U.S. 147 (1883) 13

Morissette v. United States, 342 U.S. 246 (1952) 13

Neonatology Assocs., P.A. v. Comm'r of Internal Revenue, 293 F.3d 128 (3d Cir. 2002) 8

NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) 20

Porter v. Warner Co., 328 U.S. 395 (1946) 3

Root v. Ry. Co., 105 U.S. 189 (1882) 15

SEC v. Cavanagh, 445 F.3d 105 (2d Cir. 2006) 4, 19

SEC v. Citigroup Global Markets, Inc., 752 F.3d 285 (2d Cir. 2014) 22, 23

SEC v. First City Fin. Corp., 890 F.2d 1215 (D.C. Cir. 1989) 21

SEC v. Fischbach Corp., 133 F.3d 170 (2d Cir. 1997) 2

SEC v. Huffman, 996 F.2d 800 (5th Cir. 1993) 21

SEC v. Hughes Capital Corp., 917 F. Supp. 1080 (D.N.J. 1996) 4

SEC v. Lauer, 445 F. Supp. 2d 1362 (S.D. Fla. 2006) 13

Sheldon v. Metro-Goldwyn Pictures Corp., 309 U.S. 390 (1940) 22

Smith v. SEC, 653 F.3d 121 (2d Cir. 2011) 13

Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998) 14

TABLE OF AUTHORITIES – Continued

Page

U.S. National Bank of Oregon v. Independent Insurance Agents of America, Inc., 508 U.S. 439 (1993) 7

United States v. Bitter Root Dev. Co., 200 U.S. 451 (1906) 15

Vance v. Terrazas, 444 U.S. 252 (1980) 5

STATUTES

15 U.S.C. § 78u-2 11

15 U.S.C. § 78u(d)(5) ..... *passim*

28 U.S.C. § 2462 ..... *passim*

Employee Retirement Income Security Act of 1974, § 502(a)(3) 10

Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 ..... 9, 11, 12

Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, 104 Stat. 931 11

RULES

Sup. Ct. R. 14.1(A) 4

OTHER AUTHORITIES

Bob Dylan, *Last Thoughts on Woody Guthrie*, BOB DYLAN (SONY ENTM'T), Apr. 12, 1963, http://bit.ly/1V0jYJ2 2

TABLE OF AUTHORITIES – Continued

Page

BOGERT'S LAW OF TRUSTS AND TRUSTEES (2016).....15

Francesco A. DeLuca, *Sheathing Restitution's Dagger Under the Securities Act: Why Federal Courts Are Powerless to Order Disgorgement in SEC Enforcement Proceedings*, 33 REV. OF BANKING & FINANCIAL LAW 899 (2013-14) 14, 19

GEORGE PALMER, LAW OF RESTITUTION (1978) 19

Russell Ryan, *The Equity Façade of SEC Disgorgement*, 4 HARV. BUS. L. REV. ONLINE 1 (2013).....18

Urska Velikonja, *Public Compensation for Private Harm: Evidence from the SEC's Fair Fund Distributions*, 67 STAN. L. REV. 331 (2015).....11

INTEREST OF THE *AMICUS CURIAE*

Americans for Forfeiture Reform[1] (AFR) is a non-profit, non-partisan civic group concerned with the government's fearsome power to forfeit private property—a power that is "devastating when used unjustly." *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 634 (1989). For this reason, AFR champions the proper, limited interpretation of forfeiture laws. AFR advances this mission in many ways, including by filing amicus briefs.[2]

AFR is interested in *Kokesh* because of the important questions that this case raises about the dividing line that separates legal remedies from equitable ones. That line is of vital importance in forfeiture law. "Equity never, under any circumstances, lends its aid to enforce a forfeiture or penalty, or anything in the nature of either." *Marshall v. Vicksburg*, 82 U.S. 146, 149 (1872). This principle requires courts to be vigilant against pecuniary exactions that blur the line between law and equity. Such exactions threaten vital protections against abusive forfeitures that both federal law and the Constitution provide.

---

[1] The parties have consented to this brief. No counsel for a party authored this brief in whole or in part; nor did any person or entity, other than AFR and its counsel, contribute money intended to fund the preparation or submission of this brief.

[2] *See, e.g.*, Brief of *Amicus Curiae* Americans for Forfeiture Reform in Support of Petitioner, *Luis v. United States*, No. 14-419 (U.S. Aug. 25, 2015).

SUMMARY OF THE ARGUMENT

Nobel laureate Bob Dylan has observed that sometimes "[y]ou need something to open up a new door—to show you something you['ve] seen before—but overlooked a hundred times or more."[3] For decades, lower courts have granted 'disgorgement' to the Securities & Exchange Commission (SEC) in civil enforcement actions under federal securities laws. Disgorgement enables the SEC to force defendants to pay the government an amount of money out of their general assets equal to what they allegedly took through wrongdoing. The goal here is clear: "to deter violations of the securities laws by depriving violators of their ill-gotten gains." *SEC v. Fischbach Corp.*, 133 F.3d 170, 175 (2d Cir. 1997).

The authority of federal courts to effectuate this goal, however, is not clear. Many courts have simply presumed they are authorized to grant disgorgement to the SEC. As a result, disgorgement has become, in Dylan's words, something we've seen before. But the present case opens up a new door on whether that presumption of authority is correct—a door that stems from considering whether the 5-year limitations period that 28 U.S.C. § 2462 affixes to "any civil fine, penalty, or forfeiture" also applies to disgorgement. Answering that question requires an analysis of the genesis and limits of disgorgement. And that inquiry leads one to 15 U.S.C. § 78u(d)(5).

---

[3] Bob Dylan, *Last Thoughts on Woody Guthrie*, BOB DYLAN (SONY ENTM'T), Apr. 12, 1963, http://bit.ly/1V0jYJ2.

As the Tenth Circuit noted below, under present federal securities law, any grant of disgorgement to the SEC by a federal district court is subject to 15 U.S.C. § 78u(d)(5), which "authoriz[es] [a] court to grant equitable relief sought by SEC." Pet. App. 10a. Section 78u(d)(5) actually says a bit more than that. It establishes that "[i]n any action or proceeding brought or instituted by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors." 15 U.S.C. § 78u(d)(5).

Hence, "in so many words," § 78u(d)(5) serves to "restrict[] the court's jurisdiction in equity." *Porter v. Warner Co.*, 328 U.S. 395, 398 (1946). This is true in two main respects. First, § 78u(d)(5) establishes through the use of the term "equitable relief" that a court may only grant remedies that were "typically available in equity during the days of the divided bench (meaning, the period before 1938 when courts of law and equity were separate)." *Montanile v. Bd. of Trs. of the Nat'l Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651, 657 (2016). Second, § 78u(d)(5) requires grants of equitable relief to be "appropriate or necessary for the benefit of investors."

Once these restrictions are taken into account, something quite possibly overlooked a hundred times (or more) comes into focus: district courts do not have the power to grant the kind of disgorgement at issue in this case. To the extent such disgorgement generally aims to make defendants pay—even if they no longer

possess any ill-gotten gains—this is not "equitable relief." "Equitable remedies . . . as a general rule . . . give or enforce a right to or over some particular thing rather than a right to recover a sum of money generally out of the defendant's assets." *Montanile*, 136 S. Ct. at 658–59. Also, to the extent the "purpose of [such] disgorgement is not to compensate investors," *SEC v. Cavanagh*, 445 F.3d 105, 117 (2d Cir. 2006), this is not relief "for the benefit of investors." Rather, this is relief for the government's benefit at the expense of investors—i.e., by draining funds available for restitution.[4]

Of course, the Court granted review here to decide the applicability of 28 U.S.C. § 2462 and its 5-year limitations period to disgorgement claims—not whether 15 U.S.C. § 78u(d)(5) authorizes district courts to grant the kind of disgorgement at issue. But "[t]he statement of any question presented is deemed to comprise every subsidiary question fairly included therein." Sup. Ct. R. 14.1(A). It is difficult to see how the Court can determine whether the disgorgement ordered by the district court is a fine, forfeiture, or penalty subject to 28 U.S.C. § 2462 without first identifying: (1) the authority that allows courts to grant disgorgement; and

---

[4] Disgorgement may also preclude the SEC from being able to seek restitution for investors as a matter of law. *See SEC v. Hughes Capital Corp*, 917 F. Supp. 1080, 1089 (D.N.J. 1996) ("The SEC has not identified any case in which a court has awarded restitution in addition to disgorgement pursuant to its equitable powers under the securities laws. . . . In the absence of any authority for making both awards, the court denies the SEC's motion for . . . restitution.").

(2) the extent to which the district court obeyed that authority here. The Court therefore should not hesitate to walk through the door that 28 U.S.C. § 2462 opens to the true meaning of 15 U.S.C. § 78u(d)(5).

ARGUMENT

I. In considering the Question Presented, the Court can and should address whether the district court was authorized to grant the kind of disgorgement at issue here.

The Question Presented asks: "Does the five-year statute of limitations in 28 U.S.C. § 2462 apply to claims for 'disgorgement'?" Any meaningful effort to answer this question, however, runs into a deeper question: "Was the district court authorized to grant the kind of disgorgement that the SEC requested in this case?" This is a question the Court *can* and *should* answer—especially since the answer is no, as explained in Parts III and IV below.

The Court *can* reach the legal-authority question because "consideration of issues not present in the jurisdictional statement or petition for certiorari and not presented in the Court of Appeals is not beyond [this Court's] power, and in appropriate circumstances [the Court] ha[s] addressed them." *Vance v. Terrazas*, 444 U.S. 252, 258 n.5 (1980). Also, when a "claim is properly before [a] court"—as the SEC's claim for disgorgement

is here—"the [C]ourt is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991).

The Court *should* reach the legal-authority question for three main reasons:

First, answering the legal-authority question is "essential to the analysis of the decisions below." *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 214 n.8 (2005). This case turns on the nature of the disgorgement that was granted here and whether this exaction fits the definition of "civil fine, penalty, or forfeiture" for purposes of 28 U.S.C. § 2462. In deciding whether the Tenth Circuit got this analysis right, the Court will inevitably encounter the law that the panel identified as "authorizing" disgorgement: 15 U.S.C. § 78u(d)(5). *See* Pet. App. 10a. Close review of § 78u(d)(5) in turn reveals a disconnect between the equitable, investor-focused relief that the law authorizes and the pecuniary, government-focused disgorgement that the district court ordered—a split that is fatal to the judgment below, no matter whether § 2462 applies to disgorgement claims or not.

Second, answering the legal-authority question avoids an advisory opinion on 28 U.S.C. § 2462. Indeed, if the district court's grant of disgorgement exceeded the terms set by 15 U.S.C. § 78u(d)(5), then the disgorgement was *ultra vires* and must be reversed. At that point, it is no longer necessary to decide whether

§ 2462 applies to disgorgement claims. In *U.S. National Bank of Oregon v. Independent Insurance Agents of America, Inc.*, the Court faced a similar situation. 508 U.S. 439 (1993). At issue was whether the D.C. Circuit had erred in deciding whether a federal law was still in force when neither side had raised this issue. *See id.* at 445–48. Both sides instead wanted a ruling on the merits that presumed the law was still valid. *See id.* This Court upheld the D.C. Circuit's decision to first address the law's enforceability because a "contrary conclusion would permit litigants . . . to extract . . . an opinion that would be difficult to characterize as anything but advisory." *Id.* at 446–47.

Third, answering the legal-authority question ensures this Court does not inadvertently rewrite 15 U.S.C. § 78u(d)(5). *Iselin v. United States* illuminates this point. 270 U.S. 245, 251 (1926) (Brandeis, J.). Tasked with interpreting a federal tax law, the Court found that "[t]he statute was evidently drawn with care. Its language is plain and unambiguous." *Id.* The Court then concluded that what the government really wanted in the case was "not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope." *Id.* The Court refused to "transcend[] the judicial function." *Id.* But that same risk is posed here if the Court assumes that § 78u(d)(5) authorizes the type of disgorgement that the district court imposed when the plain text of the law supports the opposite conclusion.

In the end, the legal-authority question is one that bears upon whether "a court in equity [may] depart from all precedent and assume an unregulated power of administering abstract justice at the expense of well-settled principles." *Heine v. Levee Comm'rs*, 19 U.S. 655, 658 (1874). The legal-authority question also resides within the heartland of this Court's most important duty: "to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (Marshall, C.J.). Finally, the legal-authority question fits with this Court's observation in *Marbury* that where "an act of the legislature, repugnant to the constitution, is void," then such a law does not "bind the courts, and oblige them to give it effect." *Id.* Likewise, where a disgorgement, repugnant to 15 U.S.C. § 78u(d)(5), is void, then such disgorgement does not bind higher courts and oblige them to give it effect. *Id.*

At this point, AFR acknowledges that Petitioner does not advance the legal-authority question in his opening merits brief. *See* Pet'r Br. 62 ("[T]his does not suggest that Congress . . . has not authorized the SEC to seek disgorgement."). But as Justice Alito has observed, one way an amicus brief can "provide important assistance to the court" is by making points that may be "deemed too far-reaching for emphasis by a party." *Neonatology Assocs., P.A. v. Comm'r of Internal Revenue*, 293 F.3d 128, 132 (3d Cir. 2002) (Alito, J.). AFR thus offers the following argument about the proper scope of 15 U.S.C. § 78u(d)(5)—one that AFR

believes will "help the [C]ourt toward [the] right answers." *Mass. Food Ass'n v. Mass. Alcoholic Beverage Control*, 197 F.3d 560, 567 (1st Cir. 1999).

II. The remedy of disgorgement in this case was subject to 15 U.S.C. § 78u(d)(5), which lets district courts grant "equitable relief" that is "for the benefit of investors."

The district court in this case ordered Petitioner to "disgorge $34,927,329, together with prejudgment interest thereon in the amount of $18,077,103.37." Pet. App. 47a. The district court did not cite any source of authority for this disgorgement. *See id.* The Tenth Circuit in a parenthetical, however, correctly discerned that such disgorgement would have to be "authoriz[ed]" under 15 U.S.C. § 78u(d)(5). Pet. App. 10a. That provision, in full, declares:

> In any action or proceeding brought or instituted by the [U.S. Securities and Exchange] Commission under any provision of the securities laws, the Commission may seek, and any Federal court may grant, any **equitable relief** that may be appropriate or necessary **for the benefit of investors**.

Congress enacted this language as part of the Sarbanes-Oxley Act of 2002, § 305, Pub. L. No. 107-204, 116 Stat. 745, 778–79 (July 30, 2002). That fact matters for two reasons in terms of construing the above-bolded terms in § 78u(d)(5).

Great-West: Seven months before Congress enacted the Sarbanes-Oxley Act, this Court issued its now seminal decision in *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002) on the statutory meaning of "equitable relief." At issue was § 502(a)(3) of the Employee Retirement Income Security Act of 1974 (ERISA), which enables federal courts to grant "appropriate equitable relief" to enforce the terms of ERISA plans. *Id.* at 209. The Court determined that § 502(a)(3) did not enable courts to grant "relief that was not typically available in equity." *Id.* at 210. This meant that courts had to consider "the conditions that equity attached" to a given form of equitable relief (e.g., a constructive trust) before concluding that a plaintiff's demand for such relief was indeed equitable. *Id.* at 216.

Hence, "[r]especting Congress's choice to limit the relief available under § 502(a)(3) to 'equitable relief' " compelled the Court to observe "the difference between legal and equitable forms of restitution." *Id.* at 218. "Congress felt comfortable referring to equitable relief in this statute—as it has in many others—precisely because the basic contours of the term are well known." *Id.* at 217. Adopting a more pragmatic "rolling" definition of "equitable relief," by contrast, would "introduce a high degree of confusion into congressional use (and lawyers' understanding) of the statutory term 'equity.' " *Id.*

The Court's decision in *Great-West* sheds key light on Congress's decision to use the words "equitable relief" in 15 U.S.C. § 78u(d)(5) seven months later. Congress selected these words after being placed on notice

by the Court about the inherent limits that would be read into these words whenever Congress used them. As such, the use of "equitable relief" in § 78u(d)(5) is not some mere affirmation that the SEC may seek disgorgement in court. Had Congress meant for § 78u(d)(5) to be read this way, Congress could have copied the language that it enacted 12 years earlier in § 202(a) of the Securities Enforcement Remedies and Penny Stock Reform Act of 1990 for purposes of refining disgorgement in SEC proceedings:

> In any proceeding in which the [SEC] . . . may impose a penalty under this section, the Commission . . . **may enter an order requiring accounting and disgorgement**, including reasonable interest.

Pub. L. No. 101-429, 104 Stat. 931, 938 (codified at 15 U.S.C. § 78u-2).

Effort to Compensate Victims: One of the most important goals of the Sarbanes-Oxley Act was to "expand the SEC's power to compensate defrauded investors."[5] To advance this goal, the Act enabled the SEC "to add civil fines paid in enforcement actions to disgorgement funds—called 'fair funds'—and distribute them to the victims of securities violations."[6] The relevant statutory text is telling:

---

[5] Urska Velikonja, *Public Compensation for Private Harm: Evidence from the SEC's Fair Fund Distributions*, 67 STAN. L. REV. 331, 341 (2015)

[6] *Id.* (citing § 308(a) of the Sarbanes-Oxley Act).

> If in any judicial or administrative action brought by the [SEC] under the securities laws . . . the Commission obtains an order requiring disgorgement . . . and the Commission also obtains pursuant to such laws a civil penalty . . . the amount of such civil penalty shall, on the motion or at the direction of the Commission, be added to and **become part of the disgorgement fund for the benefit of the victims** . . . .

Sarbanes-Oxley Act of 2002, § 308, Pub. L. No. 107-204, 116 Stat. 745, 784–85.

The bolded language reflects that: (1) for Congress, "disgorgement" was all about repaying injured investors—hence, Congress spoke of civil penalties becoming a part of the "disgorgement fund for the benefit of victims"; and (2) use of the words "for the benefit of" carried real meaning for Congress, establishing that an authorized remedy was meant to help someone other than the government.

Taken together, *Great-West* and the Sarbanes-Oxley Act establish why 15 U.S.C. § 78u(d)(5) is more than a shorthand way of saying that district courts are "authoriz[ed] . . . to grant equitable relief sought by [the] SEC," as the Tenth Circuit assumed here. Pet. App. 10a. The phrases "equitable relief" and "for the benefit of investors" carry specific meaning that must be considered in determining whether a court's grant of disgorgement in a SEC civil enforcement action is properly authorized under § 78u(d)(5).

This Court's precedents on how to read law counsel the same conclusion. The fundamental goal of statutory interpretation is to "give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies the legislature was ignorant of the meaning of the language it employed." *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883). And "where Congress [has] borrow[ed] terms of art . . . [it] adopts the cluster of ideas . . . attached to each borrowed word." *Morissette v. United States*, 342 U.S. 246, 263 (1952). Finally, "[w]hen a statute limits a thing to be done in a particular mode, [the statute] includes the negative of any other mode." *Botany Worsted Mills v. United States*, 278 U.S. 282, 288 (1929).

The last canon especially matters here. Both the SEC and courts have read 15 U.S.C. § 78u(d)(5) to simply recapitulate the inherent power of courts to grant equitable relief, rather than recognizing that § 78u(d)(5) statutorily displaces such inherent power and puts an investor-benefit condition on grants of "equitable relief."[7] Yet, as this Court has observed, "[c]ongressional curtailment of equity powers must be respected." *Guaranty Trust Co. v. York*, 326 U.S. 99, 105 (1945); *see also, e.g., Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 342 (1999) (Ginsburg, J., dissenting) (noting that "courts

---

[7] *See, e.g., Smith v. SEC*, 653 F.3d 121, 126 (2d Cir. 2011) (noting the SEC's argument to a magistrate judge that the judge had "inherent authority" under § 78u(d)(5) to grant certain relief sought by the SEC); *SEC v. Lauer*, 445 F. Supp. 2d 1362, 1367 (S.D. Fla. 2006) (omitting the investor-benefit clause in stating what § 78u(d)(5) authorizes).

must heed Congress' command" when Congress places express limits on equitable powers).

With that in mind, this Court should evaluate the district court's grant of disgorgement in this case against both of the meaningful conditions that 15 U.S.C. § 78u(d)(5) places on the grant of equitable remedies to the SEC. **First**, the disgorgement must fit the definition of "equitable relief" as set forth in *Great-West*. **Second**, the disgorgement must be "for the benefit of investors," as illuminated by the greater compensatory objectives and text of the Sarbanes-Oxley Act of 2002.

A final note: Disgorgement, like jurisdiction, is "a word of many, too many meanings." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998). This is a problem because many courts today have defined disgorgement in ways that wrench this term from its broader legal or historical context. For example, in attempting to establish the propriety of the district court's disgorgement order here, the Tenth Circuit explained that disgorgement constitutes "a process sometimes called 'accounting.'" Pet. App. 10a.

This definition, however, obscures an important reality: "[t]he presence of a fiduciary relationship between the claimant and the wrongdoer was essential to empower a court of equity to grant a money judgment in the form of an accounting."[8] *See, e.g.,*

---

[8] Francesco A. DeLuca, *Sheathing Restitution's Dagger Under the Securities Act: Why Federal Courts Are Powerless to Order*

United States v. Bitter Root Dev. Co., 200 U.S. 451, 478 (1906) ("We do not think that this is any . . . case as gives a court of equity jurisdiction because of an accounting being necessary. There are no accounts between the parties."). In an SEC civil enforcement action, however, there generally is no fiduciary relationship (or even business relationship) between the defendant and the SEC.[9] Rather, the relevant fiduciary relationship is generally between the defendant and his alleged victims—a distinction that in the end establishes why disgorgement generally is not "equitable relief" when sought by the SEC.

Disgorgement in SEC Enforcement Proceedings, 33 REV. OF BANKING & FINANCIAL LAW 899, 915 (2013-14); *see also* BOGERT'S LAW OF TRUSTS AND TRUSTEES § 969 (2016) ("[F]or an accounting to be ordered, there must be a fiduciary or trust relationship between the petitioner and the party from whom the accounting is sought.").

[9] Nor can it be argued that a defendant's wrongdoing itself establishes a fiduciary relationship between the defendant and the SEC. *Cf. Root v. Ry. Co.*, 105 U.S. 189, 214 (1882) ("But it is nowhere said that the patentee's right to an account is based upon the idea that there is a fiduciary relation created between him and the wrong-doer by the fact of infringement, thus conferring jurisdiction upon a court of equity to administer the trust and to compel the trustee to account. That would be a *reductio ad absurdum*, and, if accepted, would extend the jurisdiction of equity to every case of tort, where the wrong-doer had realized a pecuniary profit from his wrong.").

III. The disgorgement granted by the district court did not obey 15 U.S.C. § 78u(d)(5).

A. The disgorgement was not "equitable relief"—it was a legal claim to be paid out of Kokesh's general assets.

In *Montanile v. Board of Trustees*, 136 S. Ct. at 657–61, this Court set forth the following essential criterion that a given remedy must satisfy in order to constitute "equitable relief": "Equitable remedies are, as a general rule, directed against some specific thing; they give or enforce a right to or over some particular thing . . . rather than a right to recover a sum of money generally out of the defendant's assets." *Id.* at 658–59. In concrete terms, this means that where requested relief is directed at "specifically identified funds that remain in the defendant's possession or against traceable items that the defendant purchased with the funds (e.g., identifiable property like a car)," then the requested relief is properly deemed "equitable." *Id.*

The same is not true, however, where requested relief is directed at funds that the defendant has dissipated—e.g., a defendant who spends "the entire identifiable fund on nontraceable items (like food or travel)." *Id.* At this point, "a personal claim against the defendant's general assets" may exist, but any "recover[y] out of those assets is a legal remedy, not an equitable one." *Id.* And this remains so even though "equity courts sometimes awarded money decrees as a substitute for the value of [a] equitable lien." *Id.* at 660–61. This is because such money decrees "were still legal remedies," and the ability of equity courts to

award them rested on their ancillary jurisdiction—not their power in equity. *Id.*

Applying these principles to the disgorgement here, this disgorgement sounds in law, not equity. The district court ordered Kokesh to "disgorge $34,927,329, together with prejudgment interest thereon in the amount of $18,077,103.37." Pet App. 47a. The district court did not direct this disgorgement at any specific fund held by Kokesh. *Id.* Moreover, the district court expressly conceded that its disgorgement order was aimed at money that Kokesh no longer had, requiring Kokesh "to give up . . . even those [gains] he received many years ago and those he caused to be paid to third parties." Pet. App. 43a–44a. And the Tenth Circuit affirmed this objective on appeal insofar as it found that it was not punitive to require Kokesh "to pay for all the funds he caused to be improperly diverted to others as well as to himself." Pet. App. 12a.

It also bears mentioning that in granting this disgorgement, the district court gave the SEC exactly what it asked for. The SEC's complaint did not target any specific fund for disgorgement. The SEC instead asked the district court to "[o]rder the Defendant to disgorge an amount equal to the funds and benefits obtained illegally, or to which he is otherwise not entitled."[10] Then, in its motion for final judgment, the SEC asserted that all it had to do to be awarded disgorgement was "show a reasonable approximation of profits

---

[10] Complaint at ¶55, *SEC v. Kokesh*, No. 1:09-cv-01021 (D.N.M. filed Oct. 27, 2009), ECF No. 1.

causally connected to the violation"—i.e., it did not have to point to any specific fund in Kokesh's possession.[11] In short, the SEC's consistent position in seeking disgorgement was that Kokesh was "liable for [all of] the funds he . . . dissipated."[12]

This phenomenon is not limited to Kokesh's case. To the contrary, as a former assistant director of the SEC's Division of Enforcement has noted, "any resemblance [of disgorgement] to a truly equitable remedy largely disappears in most [SEC] cases."[13] For example, "the SEC and the courts generally say that disgorgement can be ordered . . . against [any] defendants who no longer possess or have access to the tainted profits, or never possessed them at all."[14] The SEC and courts also "say that a defendant can be held jointly and severally liable for other people's gains as long as the participants were closely related or had collaborated in their scheme."[15] These views then "call into question whether the label of equity accurately describes disgorgement."[16]

---

[11] Plaintiff's Motion for Entry of Final Judgment Against Defendant Charles R. Kokesh at 8, *SEC v. Kokesh*, No. 1:09-cv-01021 (D.N.M. filed Dec. 2, 2014), ECF No. 176.

[12] Plaintiff's Reply to Defendant's Opposition to Motion for Final Judgment at 11, *SEC v. Kokesh*, No. 1:09-cv-01021 (D.N.M. filed Jan. 21, 2015), ECF No. 181 (citation omitted).

[13] Russell Ryan, *The Equity Façade of SEC Disgorgement*, 4 HARV. BUS. L. REV. ONLINE 1, 5 (2013).

[14] *Id.*

[15] *Id.*

[16] *Id.*

That question is not resolved by declaring that "chancery courts possessed the power to order equitable disgorgement in the eighteenth century." *SEC v. Cavanagh*, 445 F.3d 105, 120 (2d Cir. 2006).[17] Rather, the question is whether the disgorgements that courts are ordering in SEC enforcement actions satisfy "the conditions that equity attached" to equitable disgorgement before the merger of law and equity. *Great-West*, 534 U.S. at 216. And the answer to that question is 'no' to the extent that these disgorgements are directed at a defendant's general assets rather than any "specific property." *Montanile*, 136 S. Ct. at 659; *cf.* GEORGE PALMER, 1 LAW OF RESTITUTION § 1.1 (1978) ("If the defendant stole the plaintiff's goods and sold them, the plaintiff was given a money judgment in the amount of proceeds at law.").

B. The disgorgement was not "for the benefit of investors"—it was solely for the government's benefit.

In enacting 15 U.S.C. § 78u(d)(5), Congress could have simply declared that the SEC "may seek, and any Federal court may grant, any equitable relief." But it didn't. Congress instead declared that the SEC "may seek, and any Federal court may grant, any equitable

---

[17] *See* DeLuca, *supra* note 8, at 902 ("*Cavanagh* makes a diligent effort to show that the liability to surrender ill-gotten gains was a standard part of eighteenth-century English equity jurisprudence, but [*Cavanagh*] succeeds only in showing that such liability was the consequence of a breach of fiduciary duty or knowing participation in such a breach.").

relief that may be appropriate or necessary **for the benefit of investors**." These words cannot be ignored—at least not so long as the "cardinal principle of statutory construction is to save and not to destroy." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937). The question then becomes: what facts did the district court find—and what showing did the government make—to prove that the disgorgement ordered against Kokesh in this case was "for the benefit of investors."

The answer is none. The district court's order contains no finding as a matter of fact or law that the disgorgement of $34,927,329 from Kokesh will benefit investors. *See* Pet. App. 41a–47a. The SEC's motion for final judgment also contains no argument or evidence to demonstrate disgorgement will benefit investors. The SEC instead makes the opposite argument to the extent that it distinguishes disgorgement from "damages, which are designed to compensate fraud victims."[18] Then, in its Tenth Circuit brief, the SEC omits the investor-benefit clause entirely in quoting

---

[18] Plaintiff's Motion for Entry of Final Judgment Against Defendant Charles R. Kokesh at 7, *supra* note 11.

15 U.S.C. § 78u(d)(5).[19] The SEC also notes the discretion of district courts "to direct disgorged funds to the U.S. Treasury rather than to victims."[20]

All of this is consistent, however, with how the SEC and courts have come to define disgorgement in the last few decades. As the Fifth Circuit explains: "Disgorgement . . . is meant to prevent the wrongdoer from enriching himself by his wrongs. Disgorgement does not aim to compensate the victims of the wrongful acts, as restitution does." *SEC v. Huffman*, 996 F.2d 800, 802 (5th Cir. 1993). What this means in practical terms is that while the present case may have been cast by the SEC as being about a major fraud that caused millions of dollars in losses to investors,[21] those investors will likely never see a dime of the money that the SEC collects in disgorgement.

The SEC may attempt to argue that investors benefit in general from SEC enforcement actions. The relevant question, however, is whether this is the kind of

---

[19] Brief of the Securities & Exchange Commission, Plaintiff-Appellee, No. 15-2087, 2015 WL 8038637, at *20 (10th Cir. filed Dec. 2015) ("Disgorgement is an equitable remedy intended to deprive wrongdoers of their unjust enrichment, *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989), imposed under the Exchange Act's authorization for district courts to grant 'any equitable relief that may be appropriate or necessary.' Section 21(d)(5), 15 U.S.C. § 78u(d)(5).").

[20] *Id.* at *34 n.12.

[21] Complaint at ¶1, *supra* note 10 ("From at least 1995 through July 2007, Kokesh systematically misappropriated approximately $45 million from four Commission-registered business development companies . . . .").

benefit that Congress had in mind when Congress added the investor-benefit clause to the text of 15 U.S.C. § 78u(d)(5). *See King v. Burwell*, 135 S. Ct. 2480, 2496 (2015) ("A fair reading of legislation demands a fair understanding of the legislative plan."). In this regard, the investor benefit that lies at the heart of the Sarbanes-Oxley Act is enabling more injured investors to be made whole. *See supra* Part II. And that accords with Congress's limitation of § 78u(d)(5) to "equitable relief" because the goal of equity is "to prevent an unjust enrichment by allowing **injured complainants** to claim that which, *ex aequo et bono*, is theirs, and nothing beyond this." *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, 399 (1940); *see also, e.g.*, *Huntington v. Attrill*, 146 U.S. 657, 667 (1892) (observing that "a statute giving the right to recover back money lost at gaming and . . . authorizing a qui tam action to be brought" is "remedial as to the loser, though penal as regards the . . . [relator]").

CONCLUSION

By addressing whether the disgorgement in this case was properly authorized under 15 U.S.C. § 78u(d)(5), the Court stands to hold the line between law and equity true and clear. And by enforcing this line against the disgorgement, the Court does not render the SEC powerless. The SEC remains "free to eschew the involvement of the courts and employ its own arsenal of remedies instead." *SEC v. Citigroup Global Markets, Inc.*, 752 F.3d 285, 297 (2d Cir. 2014). The

point is that so long as the SEC opts to "call upon the power of the courts," the SEC must also accept the limits of this power. *Id.*

Respectfully submitted,

MAHESHA P. SUBBARAMAN
Counsel of Record
SUBBARAMAN PLLC
222 S. 9th St., Ste. 1600
Minneapolis, MN 55402
(612) 315-9210
mps@subblaw.com

Dated: March 3, 2017

RECORD
D
BRIEF

Supreme Court, U.S.
FILED
MAR - 3 2017
OFFICE OF THE CLER

No. 16-529

IN THE

Supreme Court of the United States

CHARLES R. KOKESH,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Writ Of Certiorari
To The United States Court of Appeals
for the Tenth Circuit

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

THAYA BROOK KNIGHT
ILYA SHAPIRO
CATO INSTITUTE
1000 Massachusetts Ave., N.W.
Washington, D.C. 20001
tknight@cato.org

MARK A. PERRY
Counsel of Record
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., NW
Washington, D.C. 20036
(202) 955-8500
mperry@gibsondunn.com

GABRIEL K. GILLETT
MARK J. CHERRY
GIBSON, DUNN & CRUTCHER LLP
200 Park Ave.
New York, NY 10166
(212) 351-4000

Counsel for Amicus Curiae

QUESTION PRESENTED

Under 28 U.S.C. § 2462, any "action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued."

The question presented is:

Does the five-year statute of limitations in 28 U.S.C. § 2462 apply to claims for "disgorgement"?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. GRANTING THE GOVERNMENT UNLIMITED TIME TO PURSUE CLAIMS IS CONTRARY TO THE PUBLIC INTEREST 5

A. The SEC Has Vast Resources That Allow It To Bring Meritorious Actions Within Five Years. 5

B. Giving The SEC Carte Blanche To Pursue Old Cases Would Weaken Enforcement Of The Securities Laws. 9

II. ALLOWING THE GOVERNMENT TO PURSUE CLAIMS MORE THAN FIVE YEARS OLD IS BAD FOR MARKET PARTICIPANTS AND THE ECONOMY 16

A. Permitting The Pursuit Of Old Claims Creates Perpetual Liability And Uncertainty 16

B. The SEC's Practice Of Engaging In Revisionist History Exacerbates The Danger Of Allowing It To Pursue Stale Claims. 22

CONCLUSION 25

TABLE OF AUTHORITIES

Page(s)

Cases

3M Co. v. Browner,
17 F.3d 1453 (D.C. Cir. 1994) 18

Adams v. Woods,
6 U.S. (2 Cranch) 336 (1805) 18

Bandimere v. SEC,
844 F.3d 1168 (10th Cir. 2016) 6

In re Blackstreet Capital Mgmt. LLC,
2016 WL 3072131 (SEC June 1, 2016) 23

Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.,
511 U.S. 164 (1994) 9

Christopher v. SmithKline Beecham Corp.,
132 S. Ct. 2156 (2012) 24

Dirks v. SEC,
463 U.S. 646 (1963) 18

Gabelli v. SEC,
133 S. Ct. 1216 (2013) 2, 8, 17, 18, 20

Johnson v. SEC,
87 F.3d 484 (D.C. Cir. 1996) 11, 13

Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,
501 U.S. 350 (1991) 7

In re Larry C. Grossman,
2016 WL 5571616 (SEC Sept. 30, 2016) 13-14

Merck & Co. v. Reynolds,
559 U.S. 633 (2010).....7-8

Order of R.R. Telegraphers v. Ry. Express Agency,
321 U.S. 342 (1944).....20

Piatt v. Vattier,
34 U.S. 405 (1835).....24

Raymond J. Lucia Cos., Inc. v. SEC,
832 F.3d 277 (D.C. Cir. 2016).....6

SEC v. Bartek,
484 F. App'x 949 (5th Cir. 2012) 3, 12

SEC v. Brown,
658 F.3d 858 (8th Cir. 2011).....13

SEC v. Calvo,
378 F.3d 1211 (11th Cir. 2004).....13

SEC v. Commonwealth Chem. Sec., Inc.,
574 F.2d 90 (2d Cir. 1978) 10

SEC v. Contorinis,
743 F.3d 296 (2d Cir. 2014) 13

SEC v. First Jersey Sec., Inc.,
101 F.3d 1450 (2d Cir. 1996) 13

SEC v. Goble,
682 F.3d 934 (11th Cir. 2012).....12

SEC v. Graham,
823 F.3d 1357 (11th Cir. 2016) 3, 11

SEC v. Hughes Capital Corp.,
917 F. Supp. 1080 (D.N.J. 1996) 13

SEC v. JT Wallenbrock & Assoc.,
440 F.3d 1109 (9th Cir. 2006) 13

SEC v. One or More Unknown Traders,
825 F. Supp. 2d 26 (D.D.C. 2010) 8

SEC v. Shanahan,
646 F.3d 536 (8th Cir. 2011) 23

SEC v. Teo,
746 F.3d 90 (3d Cir. 2014) 13

SEC v. Wolfson,
249 F. App'x 701 (10th Cir. 2007) 12

SEC v. Wyly,
950 F. Supp. 2d 547 (S.D.N.Y. 2013) 14

United States v. Kubrick,
444 U.S. 111 (1979) 20

Upton v. SEC,
75 F.3d 92 (2d Cir. 1996) 23

Wilson v. Garcia,
471 U.S. 261 (1985) 18, 20

Statutes

28 U.S.C. § 1658(b) 8

28 U.S.C. § 2462 ..... *passim*

Rules and Regulations

17 C.F.R. § 201.630 13

17 C.F.R. § 201.1100 11

17 C.F.R. § 201.1102(b) 11

17 C.F.R. § 240.17a-4 21

17 C.F.R. § 275.204-2 21

Fed. R. Civ. P. 65(d) 12

SEC, Rules Implementing Amendment to the Investment Advisers Act of 1940 (June 22, 2011), 76 Fed. Reg. 42950 (July 19, 2011) 23

Other Authorities

Luis A. Aguilar, Comm'r, SEC, Public Statement (Nov. 18, 2015) 23

Luis A. Aguilar, Comm'r, SEC, Speech at Securities Enforcement Forum 2012: Taking a No-Nonsense Approach to Enforcing the Federal Securities Laws (Oct. 18, 2012) 12

William W. Bratton & Michael L. Wachter, *The Political Economy of Fraud on the Market*, 160 U. PA. L. REV. 69 (2011) 5

Clyde Wayne Crews, Jr., *Ten Thousand Commandments 2016: An Annual Snapshot of the Federal Regulatory State*, Competitive Enter. Inst. (2016) 20

Br. for Mark Cuban as *Amicus Curiae* Supporting Pet., *Salman v. United States*, No. 15-628 (May 13, 2016) 22

Fred D'Amato, *Comment: Equitable Claims to Disgorged Insider Trading Profits*, 1989 WIS. L. REV. 1433 (1989) 11

Deloitte Transactions and Business Analytics LLP, *5 Questions About Books And Records Compliance* (2017) 21

Jean Eaglesham, *The SEC Wins with In-House Judges*, WALL ST. J. (May 6, 2015) 6

Financial Services and General Government Appropriations for Fiscal Year 2017: Hr'g before the Subcomm. on Fin. Servs. and Gen. Gov't of the S. Comm. on Appropriations, 114th Cong., 2d Sess. 39 (2016) 7, 15

Steven R. Glaser,
Statutes of Limitations for Equitable and Remedial Relief in SEC Enforcement Actions, HARV. BUS. L. REV. 129 (2014)...10, 11, 15

6 Thomas Lee Hazen,
Treatise on the Law of Securities Regulation § 16.2 (2015) 12

Arthur B. Laby & W. Hardy Callcott,
Patterns of SEC Enforcement Under the 1990 Remedies Act: Civil Monetary Penalties, 58 ALB. L. REV. 5 (1994).....9, 20-21

Mark T. Roche, et al.,
Will the SEC Have Forever to Pursue Securities Violations?: SEC v. Gabelli,
44 SEC. REG. & L. REP. 1415 (July 23, 2012)..22-23

Russell G. Ryan,
The Equity Façade of SEC Disgorgement,
4 HARV. BUS. L. REV. ONLINE 1 (2013).....10

SEC,
FY 2017 Congressional Budget Justification (2016) 6, 7, 9, 14, 15, 16

SEC,
Welcome to the Office of the Whistleblower 6

SEC,
Whistleblower Awards.....6, 7

SEC Div. of Enforcement,
Enforcement Manual (2016).....8

Securities Diary Blog,
Courts May Be Losing Patience with the SEC's Insistence on Unjustified Bar Orders and Other Draconian Remedies
(Aug. 20, 2014) 14

U.S. GOV'T ACCOUNTABILITY OFFICE,
SEC ENFORCEMENT: MORE ACTIONS NEEDED TO IMPROVE OVERSIGHT OF DISGORGEMENT COLLECTIONS (2002) 15, 16

INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1998 to help restore the principles of limited constitutional government that are the foundation of liberty. Cato's Center for Monetary and Financial Alternatives was established in 2014 to reveal the shortcomings of today's monetary and financial-regulatory systems and to identify and promote alternatives more conducive to a stable, flourishing, and free society. Toward those ends, Cato publishes books and studies, conducts conferences and forums, produces the annual Cato Supreme Court Review, and files amicus briefs.

Cato regularly advocates for free markets and limited government. This case arises at the intersection of both issues. It concerns Cato because it implicates core questions about limits on the authority of federal agencies to bring enforcement actions involving conduct that occurred many years in the past and that, at the time, may have been widely accepted. This Court's decision will have wide ranging and dramatic impacts on the securities industry and, potentially, on other industries subject to the ever-expanding federal regulatory state. Just as Cato submitted amicus briefs to this Court in a number of securities-law cases, including *Gabelli v. SEC*, No. 11-1274 (2012), and *Salman v. United States*, No. 15-628 (2016), it submits this brief to emphasize that allowing the SEC

---

[1] All parties have consented to the filing of this brief. *Amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

to pursue stale claims would be bad public policy and would redound to the detriment of the citizenry.

INTRODUCTION AND SUMMARY OF ARGUMENT

Just four years ago, this Court unanimously held that the SEC must bring enforcement actions seeking civil money penalties within the five-year limitations period of 28 U.S.C. § 2462. *Gabelli v. SEC*, 133 S. Ct. 1216 (2013). Among other rulings in *Gabelli*, this Court specifically found no valid justification for the SEC to pursue claims more than five years after the relevant conduct had occurred. *Id.* at 1221-23. And this Court extolled the virtues of setting "a fixed date when exposure to the specified Government enforcement efforts ends." *Ibid.*

Rather than accept the holding and principles of *Gabelli*, the SEC has consistently attempted to circumvent and subvert this Court's decision. In case after case, the SEC continued to bring enforcement actions involving stale conduct, arguing that the relief being sought—monetary disgorgement, injunctions requiring defendants to obey the law, and declaratory judgments that laws were violated—was "equitable" and thus not subject to the statutory limitations period. The SEC did so knowing full well that it could not seek civil money penalties based on that same conduct. And the SEC knew full well that this Court had already rejected the core of its argument (albeit in a different but materially indistinguishable context) that Section 2462 does not apply to its enforcement actions.

The SEC is as wrong today as it was four years ago. As petitioner ably explains, the SEC's requests for disgorgement fall squarely within Section 2462.

Disgorgement is the modern incarnation of common-law forfeiture, and disgorgement is punitive because, in the SEC enforcement context, it serves no remedial purpose. *See* Pet. Br. 12-18, 23-37. Section 2462 likewise should apply to the SEC's requests for injunctive or declaratory relief. Those remedies may have been conceived as equitable and remedial, but as used by the SEC today they are anything but. They do not restore victims to their *status quo ante*. They do not aid public securities-law enforcement or encourage private compliance. *See SEC v. Graham*, 823 F.3d 1357, 1362 (11th Cir. 2016). And they are the equivalent of the professional death penalty for securities market participants. As the Fifth Circuit explained:

> The SEC's sought-after remedies would have a stigmatizing effect and long-lasting repercussions. Neither remedy addresses past harm allegedly caused by the Defendants. Nor does either remedy address the prevention of future harm in light of the minimal likelihood of similar conduct in the future. ... [T]he SEC is essentially seeking a lifetime ban against the Defendants. Courts have held that such long term bans can be construed as punitive.

SEC v. Bartek, 484 F. App'x 949, 957 (5th Cir. 2012) (per curiam), *dismissing petition for cert.*, 133 S. Ct. 1658 (2013) (granting SEC's motion to withdraw petition for certiorari shortly after this Court decided *Gabelli*).

To put an end to the SEC's gamesmanship, this Court should now categorically hold that the SEC may not institute an enforcement action seeking disgorgement, injunctive or declaratory relief more than five years after the conduct occurred. In the context of the

SEC enforcement scheme, such relief operates as a "civil fine, penalty, or forfeiture, pecuniary or otherwise." 28 U.S.C. § 2462. While the plain text of Section 2462 is sufficient to resolve the case, Cato wishes to emphasize that enforcing the statutory time-bar is good public policy for two primary reasons.

First, allowing the government unlimited time to pursue an enforcement action is against the public interest. The SEC is an administrative juggernaut with a sufficiently large budget to allow it to pursue meritorious claims well within the five-year period. And allowing the SEC to pursue stale claims would actually weaken the enforcement of the securities laws. It would tempt the agency to pursue conduct that ended long ago, distract the agency from its stated priorities of pursuing current malfeasance, and mislead Congress and the public into believing that modern markets are rife with misconduct.

Second, allowing the government unlimited time to pursue claims would be detrimental to the many individuals and businesses who are potential targets of SEC enforcement actions. It would cast an omnipresent pall of potential liability over issuers, underwriters, broker-dealers, directors, officers, shareholders, investment advisers, bankers, attorneys, accountants, and others involved in the financial markets—robbing them of repose and certainty, and forcing them to perpetually prepare for the possibility of liability, no matter how long ago the conduct ended. It would also heighten concerns that the SEC will one day change its mind—as it has multiple times before—and find conduct that was once widely viewed as acceptable to be improper.

ARGUMENT

I. GRANTING THE GOVERNMENT UNLIMITED TIME TO PURSUE CLAIMS IS CONTRARY TO THE PUBLIC INTEREST

Permitting the SEC to bring enforcement actions based on conduct that ended more than five years earlier would not serve the public good. In fact, it would do the opposite. The SEC's core mission—to maintain fair, orderly and efficient markets; protect investors; and facilitate capital formation—is not advanced by enforcement actions based on conduct that occurred more than five years earlier. Those actions neither deter current misconduct nor restore victims to their pre-misconduct state. Rather, the ability to bring such actions based on stale conduct tempts the agency to dedicate its resources to pursuing stale claims and fighting yesterday's battles, diverting resources away from policing the rapidly evolving securities markets and responding to current challenges.

A. The SEC Has Vast Resources That Allow It To Bring Meritorious Actions Within Five Years.

There is no doubt that the SEC is fully equipped to pursue any viable enforcement actions well within Section 2462's five-year limitations period. The SEC "has emerged in recent years as an expansive and powerful enforcement apparatus." William W. Bratton & Michael L. Wachter, *The Political Economy of Fraud on the Market*, 160 U. PA. L. REV. 69, 149-63 (2011). In fiscal year 2016, the SEC budgeted nearly $515 million for enforcement, which included over 1,450 full-time employees in that function—nearly 20 percent more employees than in any other function.

SEC, *FY 2017 Congressional Budget Justification* 14, 16 (2016), available at https://www.sec.gov/about/reports/secfy17congbudgjust.pdf ("*SEC Cong. Just.*"). The SEC used those resources to bring more enforcement actions (807), and to secure more awards for monetary sanctions ($4.2 billion), than ever before. *Id.* at 58. And the SEC was wildly successful, obtaining relief on one or more claims in a startling 92% of its cases. *Id.* at 37. Not content, the SEC has requested an additional $30 million and 52 additional employees for enforcement for fiscal year 2017. *Id.* at 14, 16.[2]

On top of these resources, the SEC's six-year-old whistleblower program is now "among the most powerful weapons" in its "law enforcement arsenal," offering substantial bounties and other rewards to insiders who report securities-law violations. SEC, Welcome to the Office of the Whistleblower, http://www.sec.gov/whistleblower (last visited Mar. 2, 2017). In fiscal year 2015 alone, the SEC received approximately 4,000 whistleblower tips, up about 10 percent from the prior year, and more tips than ever before. *SEC Cong. Just.* 59. As of January 2017, the SEC had doled out more than $142 million to whistleblowers—with eight of the ten largest awards coming in the past year—

---

[2] The SEC's success is in no small part attributable to its increasing preference for bringing enforcement actions before its captive tribunal rather than in district court—projecting 665 new administrative actions in fiscal year 2017, as compared to 170 new actions in federal court. *SEC Cong. Just.* 62; *see also* Jean Eagleshan, *The SEC Wins with In-House Judges*, WALL ST. J. (May 6, 2015) (finding SEC won 90 percent of cases before ALJs but only 69 percent of cases in court). The constitutionality of the SEC's Administrative Law Judges is the subject of ongoing litigation in the courts of appeals. *Compare Bandimere v. SEC*, 844 F.3d 1168, 1181-82 (10th Cir. 2016), *with Raymond J. Lucia Cos., Inc. v. SEC*, 832 F.3d 277, 289 (D.C. Cir. 2016), *judgment vacated, reh'g en banc granted* (Feb. 16, 2017).

and recovered "more than $935 million in financial remedies" as a result of whistleblower tips. SEC, Whistleblower Awards, https://www.sec.gov/page/whistleblower-100million (last visited Mar. 2, 2017). The SEC Chair touted the whistleblower program as "enormously successful ... a game-changer in many ways. [I]t's something that has really enhanced the enforcement program tremendously."[3]

To be sure, many SEC enforcement actions "are complex and can take extended periods of time to develop successfully." *SEC Cong. Just.* 38. But the SEC itself recognizes that "[t]imeliness in filing actions is important because it can enhance the action's deterrent impact." *Ibid.* That may explain why, since 2011, the SEC has on average taken fewer than 22 months to go from opening an investigation to commencing an enforcement action, and filed 62 percent of its enforcement actions within two years of opening an investigation. *Ibid.*

Requiring the SEC to bring its claims within five years—nearly three times longer than the average time it takes to bring claims—is therefore more than sufficient. Five years is as long as or longer than the statute of repose for every cause of action under either the Securities Act of 1933 or the Securities Exchange Act of 1934. *See Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 359-62 (1991). Five years is also as long as or longer than the amount of time that victims of securities fraud have to file private enforcement actions under Section 10(b) of the Securities Exchange Act and SEC Rule 10b-5, *Merck*

---

[3] *Financial Services and General Government Appropriations for Fiscal Year 2017: Hr'g before the Subcomm. on Fin. Servs. and Gen. Gov't of the S. Comm. on Appropriations*, 114th Cong., 2d Sess. 39 (2016) (statement of Mary Jo White, Chair, SEC) (hereinafter "*FY 2017 Appropriations Hr'g.*").

& Co. v. Reynolds, 559 U.S. 633, 637-38 (2010) (citing 28 U.S.C. § 1658(b)), even though private plaintiffs are "a far cry from" the SEC and are not "armed with [its] weapons," *Gabelli*, 133 S. Ct. at 1221-22.

There is no valid reason why the SEC should need more than five years before waiting to bring an action. The agency is fully equipped and well-versed in bringing claims within five years, regardless of the relief it seeks to recover. And the agency may commence a civil action at any time and take discovery under the Federal Rules of Civil Procedure to obtain evidence needed to prove its claims. *See, e.g.*, *SEC v. One or More Unknown Traders*, 825 F. Supp. 2d 26, 30 (D.D.C. 2010) (granting SEC motion for expedited discovery and a preliminary injunction).[4]

Certainty, uniformity, regularity, and the orderly administration of justice would be furthered by requiring the SEC to comply with the statutory time-bar no matter whether it seeks civil money penalties, disgorgement, an injunction, or a declaratory judgment. The SEC gains nothing by being able to pursue claims based on conduct that occurred more than five years in the past. The markets and the public, by contrast, have much to lose.

---

[4] In the unusual case, the SEC may ask the subject of an investigation to consent to toll the statute of limitations, "to allow time for sharing of information in furtherance of reaching a settlement." SEC Div. of Enforcement, Enforcement Manual 32 (2016). Nonetheless, SEC staff are directed to "take care not to delay or slow the pace of an investigation based on the potential availability or existence of a tolling agreement. Swift investigations generally are most effective and enhance the public interest." *Id.* at 41.

B. Giving The SEC Carte Blanche To Pursue Old Cases Would Weaken Enforcement Of The Securities Laws.

Permitting the SEC to bring claims based on conduct that occurred more than five years earlier would actually undermine the agency's mission to enforce the securities laws. As this Court has noted, just because a construction of a statute "[e]xtend[s]" the reach of the securities laws, "it does not follow that the objectives of the statute are better served." *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188 (1994).

This case provides a compelling illustration of that principle. Granting the SEC unlimited time to pursue old and stale cases invites distraction from the agency's core mission "to bring timely, high-quality enforcement actions" and "to protect investors." *SEC Cong. Just.* 5-6; *see also* Arthur B. Laby & W. Hardy Callcott, *Patterns of SEC Enforcement Under the 1990 Remedies Act: Civil Monetary Penalties*, 58 ALB. L. REV. 5, 51-52 (1994). By contrast, having a firm and uniform end date for when conduct can no longer be subject to an enforcement action—whether seeking a civil fine or so-called equitable relief—encourages the SEC to focus its resources on pursuing fresh cases that, if urgently investigated, might protect market participants and prevent investor losses.

The SEC's (mis)interpretation of Section 2462 has lured the agency away from pursuing fresh cases involving current issues and potential problems, and enticed it into pursuing out-of-date actions based on conduct that primarily occurred more than five years in the past. In this case, for example, the SEC brought claims against petitioner in 2009, based on conduct that occurred as far back as 1995. Pet. Br. 5. As relief,

the SEC sought disgorgement of $34.9 million, plus more than $18 million in prejudgment interest. *Id.* at 6-7. But the SEC conceded that a staggering $29.9 million of the $34.9 million it sought to disgorge (and more than $15 million in corresponding interest) came from conduct that occurred more than five years before it filed suit. *Ibid.*

It is beyond reasonable "to expect the SEC to focus its efforts on bringing claims in a timely fashion against those who are guilty of serious and intentional misconduct." Steven R. Glaser, *Statutes of Limitations for Equitable and Remedial Relief in SEC Enforcement Actions*, 4 HARV. BUS. L. REV. 129, 155 (2014). "The very fact that the SEC has waited so long" to bring cases like this suggests that "imposing sanctions on the defendant is not a top priority." *Id.* at 147. The SEC's unexplained delay in pressing its claims also "call[s] into question whether the defendant actually poses a threat to society" and whether an enforcement action is worth pursuing at all. *Ibid.*

Add to this that pursuing disgorgement years after-the-fact does not actually enhance securities-law enforcement or remedy past misconduct. The SEC's "so-called disgorgement does not purport to order specific performance, a constructive trust, or an equitable lien over specific funds or property derived from the alleged wrongdoing." Russell G. Ryan, *The Equity Façade of SEC Disgorgement*, 4 HARV. BUS. L. REV. ONLINE 1, 7-8 (2013), http://www.hblr.org/2013/11/the-equity-façade-of-sec-disgorgement. That is because the "primary purpose of disgorgement is not to compensate investors." *SEC v. Commonwealth Chem. Sec., Inc.*, 574 F.2d 90, 102 (2d Cir. 1978). The recovered funds instead go into the vaults of the U.S. Treasury, not the pockets of the victims. In fact, SEC rules

may bar the agency from using funds disgorged based on conduct more than five years earlier from being used to compensate victims through a Fair Fund. *See* 17 C.F.R. §§ 201.1100, 201.1102(b) (2016). Hence, there is no reason to grant the SEC unlimited time to pursue disgorgement in these musty cases—which are "inherently suspect" and likely "marginal" because of their age. Glaser, *supra*, at 148, 154-155 (noting that the "public does not benefit from a framework in which the SEC can wait as long as it pleases to impose significant sanctions"); *see also* Fred D'Amato, *Comment: Equitable Claims to Disgorged Insider Trading Profits*, 1989 WIS. L. REV. 1433, 1438 (1989) (concluding that disgorgement in insider-trading cases "failed to strengthen the deterrence, detection or punishment of inside traders").

Seeking punitive injunctive relief and declaratory judgment based on old conduct, like pursuing disgorgement based on old conduct, similarly does not aid SEC enforcement. When the SEC secures an "obey-the-law" injunction prohibiting conduct that has already ceased, or secures a declaratory judgment stating that securities laws were violated by conduct long ago, it is not remedying past misconduct or protecting investors. *See, e.g.*, *Graham*, 823 F.3d at 1362 ("The SEC urges us to exempt declaratory relief from § 2462 because the SEC may use findings of past violations of securities laws to obtain other remedies. We are unpersuaded."); *Johnson v. SEC*, 87 F.3d 484, 490 n.9 (D.C. Cir. 1996) ("If the SEC really viewed Johnson as a clear and present danger to the public, it is inexplicable why it waited *more than five years* to begin the proceedings to suspend her"). Punitive injunctions and declaratory judgments should therefore be subject to Section 2462's five-year limitations period, just like civil money penalties and disgorgement.

If the SEC's conception of its injunctive and declaratory relief powers result in judicially enforceable orders, *see SEC v. Goble*, 682 F.3d 934, 948-50 (11th Cir. 2012) (citing Fed. R. Civ. P. 65(d)), they operate like brutal late hits after the defendant is already down. Those measures are widely acknowledged as "severe" penalties that can have ruinous collateral consequences for a securities market participant. 6 Thomas Lee Hazen, Treatise on the Law of Securities Regulation § 16.2[2][A] (2015); *see also Bartek*, 484 F. App'x at 957 (warning about a "stigmatizing effect" and "long-lasting repercussions" from SEC injunctions and declarations). SEC Commissioners have recognized that the upshot of these supposedly equitable remedies—which the agency contends may be imposed based on old conduct—"may be more devastating than a monetary fine" that the SEC indisputably *cannot* levy based on old conduct. Luis A. Aguilar, Comm'r, SEC, Speech at Securities Enforcement Forum 2012: Taking a No-Nonsense Approach to Enforcing the Federal Securities Laws (Oct. 18, 2012), available at http://www.sec.gov/News/Speech/Detail/Speech/1365171491510.

Over time, allowing the SEC to pursue stale claims will further tempt the agency to chase outsized disgorgement awards. Because the SEC may broadly seek disgorgement of a "reasonable *approximation*" of the amount of ill-gotten gains—not a precise measure of a defendant's receipts—it has the ability to dramatically and arbitrarily inflate the amount it seeks. Indeed, reported decisions indicate that the SEC has stretched the concept of "disgorgement" far beyond its equitable roots, to reach:

- Profits earned by a defendant directly, *SEC v. Wolfson*, 249 F. App'x 701 (10th Cir. 2007);

- Profits earned and held by a co-conspirator, *SEC v. Calvo*, 378 F.3d 1211, 1215-16 (11th Cir. 2004) (per curiam);
- Reductions in a defendant's losses, *SEC v. JT Wallenbrock & Assoc.*, 440 F.3d 1109, 1117 (9th Cir. 2006);
- Legitimate operating expenses (e.g., paying employees and vendors) paid to innocent third parties, *SEC v. Brown*, 658 F.3d 858, 861 (8th Cir. 2011);
- Funds earned for and held by a defendant's employer, *SEC v. Contorinis*, 743 F.3d 296, 309-10 (2d Cir. 2014);
- Gains, such as stock appreciation, caused by events unrelated to the defendant's conduct, *SEC v. Teo*, 746 F.3d 90, 100-09 (3d Cir. 2014);
- Household expenses incurred by a defendant's spouse, *SEC v. Hughes Capital Corp.*, 917 F. Supp. 1080, 1089 (D.N.J. 1996), *aff'd* 124 F.3d 449 (3d Cir. 1997);
- Funds already repaid to victims, *Johnson*, 87 F.3d at 492 & n.13; and
- Prejudgment interest that may dwarf the actual disgorgement amount, *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1476 (2d Cir. 1996).

In the past, the SEC exercised discretion by declining to seek futile disgorgement awards that could not be satisfied. *See* 17 C.F.R. § 201.630. In recent years, however, the SEC has aggressively pushed for disgorgement of extreme amounts based on long-cold conduct. *See, e.g., In re Larry C. Grossman*, 2016 WL 5571616 (SEC Sept. 30, 2016) (ordering disgorgement

of nearly $4 million plus prejudgment interest, and industry and officer-director bars, based solely on alleged misstatements made eight years earlier); *SEC v. Wyly*, 950 F. Supp. 2d 547, 550 (S.D.N.Y. 2013) (seeking disgorgement of roughly $550 million in stock gains, plus prejudgment interest, based on allegations stretching back eighteen years), *appeal pending* No. 15-2821 (2d Cir.); *accord Courts May Be Losing Patience with the SEC's Insistence on Unjustified Bar Orders and Other Draconian Remedies*, Securities Diary Blog, https://securitiesdiary.com/2014/08/20/courts-may-be-losing-patience-with-the-secs-insistence-on-unjustified-bar-orders-and-other-draconian-remedies/ (Aug. 20, 2014) (describing and lamenting SEC's trend of seeking "ruinous" and "debilitating" relief "that go far beyond reasonable remedial responses to the violations alleged").

What's more, the SEC then uses the inflated disgorgement awards based on *old* conduct to try to justify additional resources to police *current* conduct. The SEC's most recent justification submission is telling. In asking Congress for more funding and staff, the SEC argues that it is "vital" to its "mission to bring timely, high quality enforcement actions" and to "promptly detect[] and deter[] violations of the Federal securities laws." *SEC Cong. Just.* 6, 8. The SEC also highlights a purported need to "continue to expand its enforcement function to keep pace with the growing size and complexity of the nation's markets and to swiftly and aggressively address misconduct." *Id.* at 6. As the SEC notes, in the past year it brought a "record number of enforcement actions" and obtained orders "for monetary remedies exceeding $4 billion." *Ibid.*

But the SEC fails to disclose that many of those enforcement actions and monetary awards are based on conduct that occurred more than five years in the past, *not current misconduct*. Over 136 pages discussing years of SEC activity, the SEC never notes that it has been obtaining disgorgement awards based on stale conduct that cannot be the basis for civil penalties. The SEC's refusal to distinguish between judgments based on past and current conduct has understandably created confusion among Members of Congress. *See, e.g.*, *FY 2017 Appropriations Hr'g.* (statement of Sen. Coons) (questioning whether the SEC's "enforcement caseload volume [is] a signal that there is more illicit activity going on," or just that the agency is bringing more actions). And it may be misleading Congress into approving additional funding and staff supposedly to "keep pace with [the] constantly evolving" securities markets (*SEC Cong. Just.* 6-7, 59), when at least some of those resources are actually being used to police conduct that ended more than five years earlier.

At bottom, applying Section 2462's five-year limitations period to all SEC claims is in the agency's best interest as well as the public's and the judiciary's. *Accord* Glaser, *supra* at 155 ("The public does not benefit from a framework in which the SEC can wait as long as it pleases to impose significant sanctions"). The SEC will no longer be forced "to choose between the competing priorities of collecting disgorgement and taking direct action to stop ongoing fraud." U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-02-771, SEC ENFORCEMENT: MORE ACTIONS NEEDED TO IMPROVE OVERSIGHT OF DISGORGEMENT COLLECTIONS 17 (2002). Instead, as SEC officials and staff have noted, the agency can "best serve[]" investors by being able to "concentrate more of its resources on stopping ongoing

fraud than on collecting disgorgement, because stopping ongoing fraud keeps investors from losing more money." *Id.* at 13. In other words, if the SEC is prohibited from bringing enforcement actions based on decades-old conduct, it can focus on prosecuting and preventing whatever misconduct might exists *today*. That will honor the SEC's mission "to protect investors, maintain fair, orderly and efficient markets, and facilitate capital formation." *SEC Cong. Just.* 8.

II. ALLOWING THE GOVERNMENT TO PURSUE CLAIMS MORE THAN FIVE YEARS OLD IS BAD FOR MARKET PARTICIPANTS AND THE ECONOMY

The very logic that drove this Court's unanimous decision in *Gabelli* applies with equal force here, to SEC claims for nominally equitable relief. Allowing the SEC to seek disgorgement, or injunctive or declaratory relief, based on conduct that occurred more than five years in the past would create deep uncertainty in the market. It would harm businesses, investors, individuals, and entities by forcing them to perpetually bear the burden of potential liability.

A. Permitting The Pursuit Of Old Claims Creates Perpetual Liability And Uncertainty.

Allowing the SEC to pursue what it deems to be equitable relief based on conduct more than five years old would create a cloud of potential liability over every participant in the financial markets, and an ever-present fear that decades-old conduct could give rise to an enforcement action at any moment. This uncertainty would restrict the decision-making of hundreds of securities firms, banks and asset managers that provide capital for businesses, promote job

creation, and lead economic growth in communities across the country.

Market participants need certainty about when they are clear of potential liability. As this Court explained in *Gabelli*, statutes of limitations are important precisely because they set "a fixed date when exposure to the specified Government enforcement efforts ends, advancing the basic policies of all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." 133 S. Ct. at 1221 (internal quotation marks omitted). Established limitations periods, the Court explained, further "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. They provide security and stability to human affairs [and are] vital to the welfare of society." *Ibid.* (internal quotation marks and citations omitted).

The *Gabelli* Court recognized that "even wrongdoers are entitled to assume that their sins may be forgotten." 133 S. Ct. at 1221 (internal quotations omitted). And the Court reminded that a wrongdoer's sins are easier to forget when the government acts as the sovereign seeking remediation or retribution on behalf of the public, rather than the "victim seeking recompense" directly. *Id.* at 1221-22 ("the SEC as enforcer is a far cry from the defrauded victim").

The same principles animating the Court's decision in *Gabelli* apply with equal force here. The SEC's attempts to litigate the propriety of long-completed conduct deprives participants of the tangible benefits of certainty even when the relief is denominated as

"equitable." Moreover, the important policies that *Gabelli* highlighted—repose, efficiency, predictability, and fairness—are equally important whether the SEC seeks a civil fine, disgorgement-as-forfeiture, or other punitive measures. *See Wilson v. Garcia*, 471 U.S. 261, 266 (1985) ("Few areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitations"); *Dirks v. SEC*, 463 U.S. 646, 664 & n.24 (1963) ("[I]t is essential, we think, to have a guiding principle for those whose daily activities must be limited and instructed by" the SEC). *Cf. 3M Co. v. Browner*, 17 F.3d 1453, 1457 (D.C. Cir. 1994) ("Given the reasons why we have statutes of limitations, there is no discernible rationale" for limiting Section 2462 to judicial proceedings).

Indeed, freeing the SEC of any limitations period for initiating enforcement actions would make repose impossible because it would "leave defendants exposed to Government enforcement action not only for five years after their misdeeds, but for an additional uncertain period into the future." *Gabelli*, 133 S. Ct. at 1223 (noting rejection of a rule that would have frustrated repose by "extend[ing] the limitations period to many decades" (internal quotation marks omitted)). As Chief Justice Marshall poignantly explained, giving the government such unfettered authority to bring actions "at any distance of time" would be "utterly repugnant to the genius of our laws. ... In a country where not even treason can be prosecuted after a lapse of three years, it could scarcely be supposed that an individual would remain forever liable" for civil securities-law infractions. *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 342 (1805).

Repose also provides concrete benefits to the efficient functioning of our capital markets. Under the SEC's interpretation of Section 2462, individuals and companies who reasonably believe that their conduct is lawful—and the entirely innocent persons and entities that transact with them—would never be free from SEC claims, no matter how far in the past that conduct occurred. They are unlikely to take any solace in being free from liability for civil money penalties for claims accruing five years earlier if, at any point in the future, they may nonetheless be forced to disgorge funds they never held, to suffer the consequences of being branded a securities-law violator, or to give up their chosen occupation in the securities industry. This will impede capital formation and fluidity as market participants are forced to reserve (or insure) against ever more remote enforcement contingencies.

This uncertainty will have direct economic impacts. It will raise the cost of business transactions, making due diligence more difficult and burdening successor corporations with latent liabilities they could not have known to protect against. It will also artificially reduce the risk-taking that is inherent and necessary for capitalism to function. It is not hard to imagine overly cautious lawyers squashing a great many innovative ideas out of concern about potential future enforcement actions many years down the road. This could lead many companies and individuals with valid but untested financial products to opt out of the market, preferring to withhold funding and investment opportunities rather than face perpetually overhanging liability. It could also lead talented individuals to select a career outside of securities, knowing they could one day lose their ability to earn a paycheck.

The negative impacts of the uncertainty resulting from the SEC's interpretation of Section 2462 will be felt far beyond the securities industry. Congress designed Section 2462 to serve as a catch-all statute of limitations for civil enforcement actions that applies "throughout the U.S. Code." *Gabelli*, 133 S. Ct. at 1219. If claims instituted by the SEC's Enforcement Division for self-styled equitable relief were exempt from Section 2462, then myriad federal agencies might claim free rein to bring decades-old actions against individuals and entities subject to their ever-growing reach. *See, e.g.*, Clyde Wayne Crews, Jr., *Ten Thousand Commandments 2016: An Annual Snapshot of the Federal Regulatory State* 6, Competitive Enter. Inst. (2016) (estimating that over ten years the number of "economically significant" rules in the regulatory pipeline increased by 54.6 percent and the aggregate enforcement budget of federal agencies increased by 28 percent, to $63 billion). Congress's purposeful decision to enact a default rule providing a five-year limitations period for civil enforcement actions essentially would be nullified.

If the risk of perpetual potential liability actually materializes as a case premised on old conduct, the allegations will be especially difficult for a defendant to contest. When claims are "allowed to slumber" for more than five years, often "evidence has been lost, memories have faded, and witnesses have disappeared." *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 349 (1944); *see also United States v. Kubrick*, 444 U.S. 111, 117 (1979). For that reason, in those untimely cases it is harder, if not impossible, to reach "just determinations of fact." *Wilson*, 471 U.S. at 271; *see also* Laby & Callcott, *supra*, at 52 (the "faded memories and the disappearance of

evidence may make it harder for the SEC to prove violations (and harder for some innocent defendants to demonstrate their blamelessness)"). That in turn increases the length and cost of litigation, as the parties are forced to pursue leads that are less likely to yield admissible evidence. It also multiplies the inherent uncertainty of litigation by making it harder to evaluate the strength of each side's trial position.

This puts market participants on the horns of a dilemma. Should they squander even more capital on recordkeeping by permanently preserving millions of pages of documents and terabytes of data to potentially defend against an unknown future claim? *See, e.g.*, Deloitte Transactions and Business Analytics LLP, *5 Questions About Books And Records Compliance* (2017) ("A large broker-dealer may be required to produce and properly store several hundred different types of records" many of which "are assembled from data stored in multiple information systems, external sources and markets"). Or should they risk being unable to prove a valid defense years after-the-fact because the critical documents have been lawfully purged? *See, e.g.*, 17 C.F.R. § 240.17a-4 (requiring exchange members and broker/dealers to preserve certain records for up to six years); 17 C.F.R. § 275.204-2 (requiring investment advisors to maintain various records for five years). Meanwhile, the SEC may not face such an untenable choice: it can retain the relevant documents it acquires during an investigation until it is ready to bring charges (or, perhaps, until after the target has purged its files).

The risk of liability stretching far into the past may have the additional effect of immunizing the SEC from being challenged. Defendants may well opt to

settle even questionable SEC claims rather than expending significant legal fees and risking astronomical disgorgement judgments requiring repayment of funds disbursed long-ago, if ever held at all. *Cf.* Br. for Mark Cuban as *Amicus Curiae* Supporting Pet. at 1, 3, *Salman v. United States*, No. 15-628 (May 13, 2016) (highlighting personal, professional, and financial costs of challenging and beating baseless SEC allegations rather than admitting that acceptable conduct was improper). And the SEC, secure in knowing that it may never be forced to prevail on its aggressive legal theories or prove its factual allegations at trial, may well become emboldened and pursue evermore far-fetched claims. That would be bad for everyone.

B. The SEC's Practice Of Engaging In Revisionist History Exacerbates The Danger Of Allowing It To Pursue Stale Claims.

The SEC's evolving policy positions and enforcement initiatives magnify the unfairness of never-ending potential liability. The SEC often looks back at once-widespread market practices and decides that, in retrospect, they were problematic. As a result, businesses and investors have been caught up in enforcement "sweeps" for years-old conduct that, to the best of anyone's knowledge, was permissible when engaged in.

Gabelli itself is one example. The petitioners there were among dozens of mutual fund advisers who allegedly permitted market timing, a common practice that had been the subject of public comment and was known to the SEC since the mid-1990s. *See* Mark T. Roche, et al., *Will the SEC Have Forever to Pursue Securities Violations?*: SEC v. Gabelli, 44 SEC. REG. &

L. REP. 1415, at 2 n.3 (July 23, 2012) (citing the government's stipulation in *SEC v. O'Meally*, No. 06-cv-06483 (S.D.N.Y. 2011)). But the SEC reversed course and decided to launch industry-wide enforcement actions after state attorneys general began lawsuits alleging illegal market timing. *See id.* at 2.

Gabelli is far from the only case in which the SEC pursued claims based on conduct that it previously permitted. The SEC recently sought disgorgement from private equity advisers who did not register as investment advisors in the mid-aughts, *In re Blackstreet Capital Mgmt. LLC*, 2016 WL 3072131 (SEC June 1, 2016), even though they were not required to register until 2012, *see* SEC, Rules Implementing Amendment to the Investment Advisers Act of 1940, at 1 (June 22, 2011), 76 Fed. Reg. 42950 (July 19, 2011) (codified at 17 C.F.R. pt. 275, 279). The SEC also recently targeted alternative trading systems that it had accepted as enhancing market liquidity since the 1960s. *See* Luis A. Aguilar, Comm'r, SEC, Public Statement (Nov. 18, 2015), available at https://www.sec.gov/news/statement/shedding-light-on-dark-pools.html (last visited Mar. 2, 2017). There are past examples, too, of the SEC bringing enforcement actions targeting old conduct after changing its position on a widely known and accepted practice. *See, e.g.*, *SEC v. Shanahan*, 646 F.3d 536, 544-45 (8th Cir. 2011) (finding director acted in good faith based on professional advice in back-dating stock options); *Upton v. SEC*, 75 F.3d 92, 98 (2d Cir. 1996) (vacating SEC censure, for lack of notice to defendant, where the agency knew about the practice at issue before it occurred and did not condemn it).

The point is not that the SEC may never reconsider market practices to determine if they remain consistent with the securities laws and relevant regulations. But five years provides a more than adequate look-back period if the agency chooses to undertake such a re-examination. The longer the SEC waits to condemn actions considered acceptable at the time, the greater the likelihood that its efforts will disrupt long-settled expectations. The risk of "unfair surprise is acute," this Court has warned, when an agency seeks "to impose potentially massive liability on respondent for conduct that occurred well before" the agency announced its new view, and after "a very lengthy period of conspicuous inaction." *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012). Applying Section 2462 to what the SEC deems to be equitable relief will thus simultaneously limit the agency's ability to unfairly reprimand individuals for conduct that appeared to be permissible at the time, and enhance public confidence in the agency's decision-making by reducing both the perception and the reality of arbitrariness.

Finally, applying Section 2462 to all SEC claims, including for purported equitable relief, will buttress, rather than undermine, core principles of equity by encouraging the SEC to proceed with (relative) dispatch. After all, "'[a] court of equity ... has always refused its aid to stale demands, where the party has slept upon his rights, or acquiesced for a great length of time.'" *Piatt v. Vattier*, 34 U.S. 405, 416 (1835) (citation omitted). Requiring the SEC to institute its enforcement actions promptly is equitable, just, lawful, fair, and right. The agency's contrary position is not.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

THAYA BROOK KNIGHT
ILYA SHAPIRO
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, D.C. 20001
tknight@cato.org

MARK A. PERRY
Counsel of Record
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., NW
Washington, D.C. 20036
(202) 955-8500
mperry@gibsondunn.com

GABRIEL K. GILLETT
MARK J. CHERRY
GIBSON, DUNN & CRUTCHER LLP
200 Park Ave.
New York, NY 10166
(212) 351-4000

Counsel for Amicus Curiae

March 3, 2017

ECORD
AND
RIEFS

Supreme Court, U.S.
FILED
MAR 3 - 2017
OFFICE OF THE CLERK

No. 16-529

IN THE

Supreme Court of the United States

CHARLES R. KOKESH,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE AMERICAN PETROLEUM INSTITUTE AS AMICI CURIAE IN SUPPORT OF PETITIONER

KATE COMERFORD TODD
STEVEN P. LEHOTSKY
JANET GALERIA
U.S. CHAMBER
LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

STACY LINDEN
PETER TOLSDORF
AMERICAN PETROLEUM
INSTITUTE
1220 L Street, NW
Washington, DC 20005

MATTHEW T. MARTENS
Counsel of Record
JOHN BYRNES
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
matthew.martens@wilmerhale.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. The Court Of Appeals' Decision Would Allow Agencies Throughout The Federal Government To Seek Punitive Disgorgement Without Limitation 4

A. The Consumer Financial Protection Bureau (CFPB) 5

B. The Environmental Protection Agency (EPA) 8

C. The Federal Energy Regulatory Commission (FERC) 9

D. The Federal Trade Commission (FTC) 10

E. The Food and Drug Administration (FDA) 12

II. The Court Of Appeals' Reading Of Section 2462 Is Unfair And Harmful To Businesses 13

CONCLUSION 19

TABLE OF AUTHORITIES

CASES

Page(s)

Adams v. *Woods*, 6 U.S. (2 Cranch) 336 (1805) 14

CFPB v. *Corinthian Colleges, Inc.*, 2015 WL 10854380 (N.D. Ill. Oct. 27, 2015) 5

CFPB v. *Frederick J. Hanna & Associates, P.C.*, 114 F. Supp. 3d 1342 (N.D. Ga. 2015) 6

CFPB v. *Gordon*, 819 F.3d 1179 (9th Cir. 2016) 15, 18

CFPB v. *ITT Educational Services, Inc.*, 2015 WL 1013508 (S.D. Ind. Mar. 6, 2015) 6

CFPB v. *Mortgage Law Group, LLP*, 196 F. Supp. 3d 920 (W.D. Wis. 2016) 6

Christianson v. *Colt Industries Operating Corp.*, 486 U.S. 800 (1988) 17

Coastal Oil & Gas Corp. v. *FERC*, 782 F.2d 1249 (5th Cir. 1986) 9

Ditthardt v. *North Ocean Condos, L.P.*, 580 F. Supp. 2d 1288 (S.D. Fla. 2008) 7

FEC v. *Craig for U.S. Senate*, 816 F.3d 829 (D.C. Cir. 2016) 5

FERC v. *Barclays Bank PLC*, 105 F. Supp. 3d 1121 (E.D. Cal. 2015) 9

FTC v. *AMG Services, Inc.*, 2016 WL 5791416 (D. Nev. Sept. 30, 2016) 11

FTC v. *Figgie International*, 994 F.2d 595 (9th Cir. 1993) 11

FTC v. *Slimamerica, Inc.*, 77 F. Supp. 2d 1263 (S.D. Fla. 1999) 11

TABLE OF AUTHORITIES—Continued

Page(s)

Gabelli v. *SEC*, 133 S. Ct. 1216 (2013) 14

HUD v. *Cost Control Marketing & Sales Management of Virginia, Inc.*, 64 F.3d 920 (4th Cir. 1995) 16

In re Jensen, 395 B.R. 472 (Bankr. D. Colo. 2008) 16

In re Telsey, 144 B.R. 563 (Bankr. S.D. Fla. 1992) 16

In re Towers, 162 F.3d 952 (7th Cir. 1998) 16

Mayes v. *EPA*, 2008 WL 65178 (E.D. Tenn. Jan. 4, 2008) 8

Mesa Petroleum Co. v. *Federal Power Commission*, 441 F.2d 182 (5th Cir. 1971) 9

New England Telephone & Telegraph Co. v. *FCC*, 826 F.2d 1101 (D.C. Cir. 1987) 5

Northcross v. *Board of Education of Memphis City Schools*, 412 U.S. 427 (1973) 17

PHH Corp. v. *CFPB*, 839 F.3d 1 (D.C. Cir. 2016) 7, 15

SEC v. *First City Financial Corp.*, 890 F.2d 1215 (D.C. Cir. 1989) 18

SEC v. *Teo*, 746 F.3d 90 (3d Cir. 2014) 18

SEC v. *Texas Gulf Sulphur Co.*, 312 F. Supp. 77 (S.D.N.Y. 1970) 4

Southern Union Gas Co. v. *FERC*, 725 F.2d 99 (10th Cir. 1984) 9

TABLE OF AUTHORITIES—Continued

Page(s)

United States ex rel. Zissler v. *Regents of University of Minnesota*, 992 F. Supp. 1097 (D. Minn. 1998) 3

United States v. *C.E.B. Products, Inc.*, 380 F. Supp. 664 (N.D. Ill. 1974) 13

United States v. *Caputo*, 288 F. Supp. 2d 912 (N.D. Ill. 2003) 12

United States v. *Incorporated Village of Island Park*, 791 F. Supp. 354 (E.D.N.Y. 1992) 5

United States v. *Keyspan Corp.*, 763 F. Supp. 2d 633 (S.D.N.Y. 2011) 5

United States v. *Kubrick*, 444 U.S. 111 (1979) 14, 18

United States v. *Lane Labs-USA Inc.*, 427 F.3d 219 (3d Cir. 2005) 12, 13

United States v. *Loud Hawk*, 474 U.S. 302 (1986) 18

United States v. *Midwest Generation, LLC*, 720 F.3d 644 (7th Cir. 2013) 8

United States v. *Mlaskoch*, 2014 WL 1281523 (D. Minn. Mar. 31, 2014) 8

United States v. *Municipal Authority*, 150 F.3d 259 (3d Cir. 1998) 8

United States v. *Philip Morris Inc.*, 116 F. Supp. 2d 131 (D.D.C. 2000) 3

United States v. *Rx Depot, Inc.*, 438 F.3d 1052 (10th Cir. 2006) 12

United States v. *Scenic View Dairy, LLC.*, 2011 WL 3879490 (W.D. Mich. Sept. 1, 2011) 12

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. *Smithfield Foods, Inc.*, 191 F.3d 516 (4th Cir. 1999) 8

United States v. *Sutton*, 795 F.2d 1040 (Temp. Emer. Ct. App. 1986) 5

United States v. *Ten Cartons, Ener-B Nasal Gel*, 888 F. Supp. 381 (E.D.N.Y.) 12

United States v. *Universal Management Services, Corp.*, 191 F.3d 750 (6th Cir. 1999) 12

AGENCY PROCEEDINGS

Consent Order, *In re Citibank, N.A.*, 2015-CFPB-0015 (July 21, 2015) 3, 6

Federal Reserve Bank, Order, *In re Higher One, Inc.*, No. 15-026-E-I (Dec. 23, 2015) 5

FTC, Dissenting Statement of Commissioner Ohlhausen (Apr. 17, 2015), *available at* https://www.ftc.gov/system/files/documents/public_statements/637761/150420cardinalhealthohlhausen.pdf 11

FTC, Statement of the Commission (July 31, 2012), *available at* https://www.ftc.gov/system/files/documents/public_statements/296171/120731commstmt-monetaryremedies.pdf 11

In re B.J. Carney Industries, 7 E.A.D. 171 (EPA 1997) 8

In re Blackstreet Capital Management LLC, SEC Release No. 77959 (June 1, 2016) 15

TABLE OF AUTHORITIES—Continued

Page(s)

In re Kohlberg Kravis Roberts & Co. LP, SEC Release No. 4131 (June 29, 2015) 15

IRS, Office of Chief Counsel, Memorandum, No. 201619008 (May 6, 2016), *available at* https://www.irs.gov/pub/irs-wd/201619008.pdf 17

People of State of California ex rel. Brown v. *Powerex Corp.*, 135 FERC ¶ 61,178 (May 24, 2011) 9

Prohibition of Energy Market Manipulation, 114 FERC ¶ 61,047 (Jan. 19, 2006) 10

STATUTES, RULES, AND REGULATIONS

11 U.S.C. § 523 16

12 U.S.C.
§ 5531 7
§ 5564 7

15 U.S.C.
§ 53 12
§ 57b 11

18 U.S.C. § 3282 12

21 U.S.C. § 332(a) 12

28 U.S.C. § 2462 ..... *passim*

33 U.S.C. § 1319 8

Energy Policy Act of 2005, Pub. L. No. 109-58, § 314, 119 Stat. 594, 690 (2005) (codified at 15 U.S.C. § 717t-1) 9

17 C.F.R. 275.203A-1 15

TABLE OF AUTHORITIES—Continued

Page(s)

76 Fed. Reg. 42,950 (July 19, 2011) 15

68 Fed. Reg. 45,820 (Aug. 4, 2003) 10

OTHER AUTHORITIES

CFPB, *Factsheet: Enforcing Federal Consumer Protection Laws* (July 13, 2016), *available at* http://files.consumerfinance.gov/f/documents/07132016_cfpb_SEFL_anniversary_factsheet.pdf 14

FTC, *Stats & Data 2015*, *available at* https://www.ftc.gov/node/943403 (last visited Mar. 3, 2017) 14

Press Release No. 2015-245, *SEC Announces Enforcement Results For FY 2015* (Oct. 22, 2015), *available at* https://www.sec.gov/news/pressrelease/2015-245.html 15

Press Release, No. 7488-16, *CFTC Releases Annual Enforcement Results for Fiscal Year 2016* (Nov. 21, 2016), *available at* http://www.cftc.gov/PressRoom/PressReleases/pr7488-16 13

SEC, *Select SEC and Market Data Fiscal 2016*, *available at* https://www.sec.gov/reportspubs/select-sec-and-market-data/secstats2016.pdf (last visited Mar. 3, 2017) 14

Vodra, William W. & Arthur N. Levine, *Anchors Away: The Food and Drug Administration's Use of Disgorgement Abandons Legal Moorings*, 59 Food & Drug L.J. 1 (2004) 13

INTEREST OF AMICI CURIAE[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

The American Petroleum Institute (API) is a national trade association representing more than 640 companies in the oil and natural gas industry. Its members range from the largest major integrated oil companies to the smallest of independents, as well as other producers, refiners, suppliers, pipeline operators, marine transporters, and service and supply companies that support all segments of the industry. Together with its member companies, API is committed to ensuring a strong, viable U.S. oil and natural gas industry capable of meeting the energy needs of our nation in an efficient and environmentally responsible manner. API frequently participates in legislative, administrative, and judicial proceedings that present issues of national concern, including issues related to the enforcement of federal energy and environmental regulations.

---

[1] No counsel for a party authored this brief in whole or in part, and no entity or person, aside from *amici curiae*, their members, and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Letters consenting to the filing of this brief are on file with the Clerk.

The members of the Chamber and API recognize that the appropriate exercise of enforcement powers by the SEC and other agencies is important for ensuring that our markets function fairly and effectively. As Congress has established, however, those enforcement powers must be checked by reasonable statutes of limitation and repose that apply as strongly to punitive disgorgement as to other fines, penalties, and forfeitures. Regardless of its particular form, the cloud of potential liability hampers business and investment activity, and long-belated enforcement actions are less likely to protect or help market participants. The Court should reverse the decision of the Tenth Circuit.

SUMMARY OF ARGUMENT

In October 2009, the SEC filed suit against petitioner seeking, among other things, "disgorgement" of ill-gotten gains from alleged securities law violations. Pet. App. 2a. After a trial more than five years later (in November 2014), the district court ordered that petitioner disgorge approximately $35 million, of which approximately $30 million was the result of conduct that occurred more than five years before the SEC's complaint was filed. *Id.* 45a; Dist. Dkt. 181, at 2. The district court further ordered that petitioner pay $18 million in prejudgment interest on the disgorgement award. Pet. App. 45a. Petitioner argued that he should not be faced with crippling monetary penalties based on conduct occurring as much as fourteen years before the SEC filed suit (and twenty years before the matter was finally litigated). However, the SEC responded that there is *no* statute of limitations for "disgorgement" claims. *Id.* 41a. According to the SEC, disgorgement is not a "fine, penalty, or forfeiture" subject to the five-year statute of limitations set out in 28 U.S.C. § 2462.

This is not an isolated issue. Like the SEC, numerous other federal agencies rely on disgorgement and restitution orders to obtain major monetary awards against defendants. *See, e.g.*, Consent Order, *In re Citibank, N.A.*, 2015-CFPB-0015 ¶¶ 7(h), 32, 79, 104 (July 21, 2015) (CFPB order imposing civil penalties of $35 million and restitution of $700 million for deceptively marketed credit monitoring services, for conduct beginning as early as 2003); *United States* v. *Philip Morris Inc.*, 116 F. Supp. 2d 131, 150 & n.27 (D.D.C. 2000) (permitting Department of Justice to seek disgorgement for profits earned by tobacco companies from 1953 to the present); *United States ex rel. Zissler* v. *Regents of Univ. of Minnesota*, 992 F. Supp. 1097, 1109 (D. Minn. 1998) (permitting government to seek disgorgement of profits from sale of drug over two decades, in violation of FDA order). And like the SEC, numerous other federal agencies enforce statutes that are subject only to the limitations period of § 2462. Thus, under the Tenth Circuit's reading of § 2462, businesses are faced with the permanent specter of massive liability (with constantly accruing prejudgment interest) from across the regulatory spectrum. As more agencies follow the SEC's lead in pursuing aggressive theories of disgorgement—emboldened by the Tenth Circuit's decision—the risk to businesses will only grow.

Allowing agencies to seek disgorgement orders without limitation is contrary to the basic principles of repose and certainty. In addition to a lack of certainty, the Tenth Circuit's decision, if upheld, will be unfair to businesses in multiple ways. *First*, given that agencies regularly seek to impose liability based on new interpretations of the law or enforcement priorities, the Tenth Circuit's rule would increase the risk that agencies will seek disgorgement for long-past conduct

that may have been acceptable at the time. *Second*, the potential for disgorgement liability is not only indefinite, but irreversible—in the bankruptcy context, agencies have taken the contradictory position that disgorgement orders are non-dischargeable penalties. *Third*, because agencies are only required to provide a "reasonable approximation" of the amount to be disgorged, it is defendants that bear the burden of fading memories and lost documents in belated enforcement actions.

Basic fairness demands that the liability risk posed by these potentially astronomical disgorgement awards have an expiration date. In enacting § 2462, Congress agreed. Accordingly, this Court should reverse the decision of the Tenth Circuit.

ARGUMENT

I. THE COURT OF APPEALS' DECISION WOULD ALLOW AGENCIES THROUGHOUT THE FEDERAL GOVERNMENT TO SEEK PUNITIVE DISGORGEMENT WITHOUT LIMITATION

Aggressive disgorgement is not just a tactic employed by the SEC to avoid statutory limitations periods. Since the SEC pioneered the use of disgorgement in the 1970s, *see SEC* v. *Texas Gulf Sulphur Co.*, 312 F. Supp. 77 (S.D.N.Y. 1970), *aff'd in relevant part*, 446 F.2d 1301 (2d Cir. 1971), agencies throughout the federal government have adopted disgorgement as a powerful tool to punish and deter misconduct. Under the Tenth Circuit's decision, many of these agencies would be free to seek disgorgement without any time limitation: Just like the SEC-enforced Securities Act, Exchange Act, Advisers Act, and Investment Company Act, countless federal statutes fail to specify a limitations period, relying instead on the default period congressionally established by § 2462.

While it is impractical to describe the enforcement practices of every one of the many agencies that seek to recover disgorgement, the following discussion illustrates the broad range of uses—and abuses—of disgorgement throughout the federal government.[2]

A. The Consumer Financial Protection Bureau (CFPB)

In its early years as the enforcer of a range of federal consumer protection laws, the CFPB has shown a willingness to take aggressive litigation positions in an effort to maximize monetary payments from companies and to avoid statutes of limitations.

As is the case with the SEC, the disgorgement sought by the CFPB may dwarf the civil penalties imposed. *See, e.g., CFPB* v. *Corinthian Colls., Inc.*, 2015

---

[2] In addition to the agencies discussed below, a partial list of other agencies that seek disgorgement and other equitable monetary relief includes the Department of Energy, *United States* v. *Sutton*, 795 F.2d 1040, 1062 (Temp. Emer. Ct. App. 1986) (ordering over $200 million in disgorgement for price control violations); the Department of Housing and Urban Development, *United States* v. *Incorporated Vill. of Island Park*, 791 F. Supp. 354, 370 (E.D.N.Y. 1992) (holding that government claim for disgorgement of profits from developers of housing project was not barred by statute of limitations); the Department of Justice, *United States* v. *Keyspan Corp.*, 763 F. Supp. 2d 633, 640 (S.D.N.Y. 2011) (permitting disgorgement for antitrust violations); the Federal Communications Commission, *New England Tel. & Tel. Co.* v. *FCC*, 826 F.2d 1101, 1105 (D.C. Cir. 1987) (ordering over $100 million in disgorgement for excessive rates); the Federal Election Commission, *FEC* v. *Craig for U.S. Senate*, 816 F.3d 829, 848 (D.C. Cir. 2016) (ordering senator to disgorge nearly $200,000 in improperly used campaign funds); and the Federal Reserve Bank, Order ¶¶ 6, 12, *In re Higher One, Inc.*, No. 15-026-E-I (Dec. 23, 2015) (ordering restitution of $24 million and imposing civil penalty of $2 million for unlawful conduct related to student loans).

WL 10854380, at *6 (N.D. Ill. Oct. 27, 2015) (entering disgorgement order of $531 million against for-profit college, equal to the entire face value of loans issued, plus fees and interest); Consent Order, *In re Citibank, N.A.*, 2015-CFPB-0015 ¶¶ 7(h), 32, 79, 104 (July 21, 2015) (ordering civil penalties of $35 million and restitution of $700 million for deceptively marketed credit monitoring services, for conduct beginning as early as 2003). In pursuing these disgorgement orders, the CFPB discards traditional notions of equity and seeks amounts that exceed both the benefits to defendants and the harm to consumers—*i.e.*, refusing to deduct business expenses or offset benefits to consumers. *See, e.g.*, *CFPB* v. *Mortgage Law Grp., LLP*, 196 F. Supp. 3d 920, 950 (W.D. Wis. 2016) (ordering two law firms to disgorge over $20 million, consisting of the firms' total revenues, not profits, from providing home loan modification services).

Although a number of the consumer protection statutes enforced by the CFPB contain express limitation periods, the CFPB has argued that those limitations apply only to private actions brought under the statute. *See, e.g.*, *CFPB* v. *Frederick J. Hanna & Assocs., P.C.*, 114 F. Supp. 3d 1342, 1376 (N.D. Ga. 2015) (arguing that one-year limitations period in Fair Debt Collection Practices Act does not apply to the government); *CFPB* v. *ITT Educ. Servs., Inc.*, 2015 WL 1013508, at *33 (S.D. Ind. Mar. 6, 2015) (arguing that one-year limitations period in Truth In Lending Act does not apply to the government). If the limitations periods in these statutes do not apply, § 2462 stands as a needed protection against indefinite government action.[3]

---

[3] Section 2462 also operates as a backstop to other statutes of limitation that have a discovery rule. For example, enforcement proceedings by the CFPB against "unfair, deceptive, or abusive act

The CFPB has also taken the startling position that it need not comply with *any* statutes of limitations when proceeding administratively. *See PHH Corp.* v. *CFPB*, 839 F.3d 1, 50 (D.C. Cir. 2016), *reh'g en banc granted, order vacated* (Feb. 16, 2017). *PHH* involved an effort by the CFPB to impose a $109 million disgorgement order based on a retroactive interpretation of the Real Estate Settlement Procedures Act, for conduct occurring as far back as 2008. *Id.* at 46. A panel of the D.C. Circuit rejected the CFPB's position, citing § 2462 for the proposition that "[t]he general working presumption in federal civil and criminal cases is that a federal civil cause of action or criminal offense must have some statute of limitations and must not allow suits to be brought forever and ever after the acts in question." *Id.* at 50. Although the Bureau's approach has so far been unsuccessful, businesses have little assurance that the CFPB will not follow the SEC's lead and shift to using disgorgement to avoid statutes of limitations. Business should not be forced to trust in agencies' "prosecutorial discretion" not to bring stale cases years or decades after the fact. *Id.*

---

or practice[s]" (UDAAP) may not be brought "more than 3 years after the date of discovery of the violation to which an action relates." 12 U.S.C. §§ 5531(a), 5564(g)(1). This general limitations period, however, does not override § 2462's 5-year limitations period, which is specific to actions for the enforcement of a "civil fine, penalty, or forfeiture." *Cf. Ditthardt* v. *North Ocean Condos, L.P.*, 580 F. Supp. 2d 1288, 1292 (S.D. Fla. 2008) (considering two separate federal statutes of limitations, concluding that "where two statutes of limitations might be read to apply in a particular situation, one general and one more specific, the general rule is that the court must apply the more specific limitations period" (citing cases)).

B. The Environmental Protection Agency (EPA)

Like the SEC, many of the statutes enforced by the EPA lack statutory limitations periods. *See, e.g.*, *United States* v. *Midwest Generation, LLC*, 720 F.3d 644, 646 (7th Cir. 2013) (Clean Air Act); *United States* v. *Mlaskoch*, 2014 WL 1281523, at *10 (D. Minn. Mar. 31, 2014) (Clean Water Act); *Mayes* v. *EPA*, 2008 WL 65178, at *7 (E.D. Tenn. Jan. 4, 2008) (Resource Conservation and Recovery Act). As a result, EPA is subject to § 2462's five-year limitations period when pursuing enforcement actions. *See Mlaskoch*, 2014 WL 1281523, at *10.

As a general practice, the EPA relies heavily on civil penalties to obtain monetary relief in its enforcement actions. However, there is little substantive difference between the civil penalties imposed by the EPA and the type of disgorgement sought by the SEC. For example, in calculating penalties under the Clean Water Act, courts will look to the "wrongful profits" obtained while the defendant was operating in violation of the law. *United States* v. *Mun. Auth.*, 150 F.3d 259, 267 (3d Cir. 1998); *see also* 33 U.S.C. § 1319(d) (requiring consideration of "economic benefit" in setting penalty). Then, when calculating the amount of those wrongful profits, courts will rely on "'reasonable approximations of economic benefit.'" *United States* v. *Smithfield Foods, Inc.*, 191 F.3d 516, 529 (4th Cir. 1999); *accord In re B.J. Carney Indus.*, 7 E.A.D. 171, 217-218 (EPA 1997). Notably, these are precisely the standards the courts use in calculating disgorgement in SEC enforcement actions. *See* Pet. App. 44a. Thus, in seeking the same type of punitive disgorgement used by the SEC, the EPA would be able to avoid the five-year statute of limitations simply by characterizing its remedy as "disgorgement" rather than a "penalty." The Court

should not sanction this anomalous result and should instead properly recognize disgorgement as equivalent to a penalty or forfeiture.

C. The Federal Energy Regulatory Commission (FERC)

After the SEC began pursuing disgorgement in the 1970s, FERC quickly followed suit. *See, e.g.*, *Southern Union Gas Co.* v. *FERC*, 725 F.2d 99, 101-102 (10th Cir. 1984) (ordering payment of appropriate rates for past deliveries of natural gas); *Mesa Petroleum Co.* v. *Federal Power Comm'n*, 441 F.2d 182, 186 (5th Cir. 1971) (ordering refund of excessive amounts paid for natural gas). Before the Energy Policy Act of 2005,[4] FERC did not have the authority to impose civil penalties, so disgorgement was the only option for monetary relief. *See Coastal Oil & Gas Corp.* v. *FERC*, 782 F.2d 1249, 1253 (5th Cir. 1986). Given the limitations on FERC's enforcement powers, courts were careful to ensure that FERC disgorgement orders did not take on the characteristics of a penalty. *See id.* (finding that FERC disgorgement order constituted an unauthorized penalty, on grounds that order required company to "forfeit[] all of its profits, but ... also [be] denied any payment whatsoever for the gas, including the recoupment of costs"); *see also People of State of California ex rel. Brown* v. *Powerex Corp.*, 135 FERC ¶ 61,178, ¶ 62,073 (May 24, 2011) (rejecting California's

---

[4] *See* Pub. L. No. 109-58, § 314, 119 Stat. 594, 690-691 (2005) (codified at 15 U.S.C. § 717t-1). The penalty provisions of the Energy Policy Act are harsh—$1 million per day per violation—and have the potential to lead to heavy liability. *See, e.g.*, *FERC* v. *Barclays Bank PLC*, 105 F. Supp. 3d 1121, 1127 (E.D. Cal. 2015) (upholding FERC order with $435 million in civil penalties and $34.9 million in disgorgement).

requested disgorgement order as a time-barred penalty, and rejecting argument that the relief was "appropriate because it would make the ratepayers of California whole").[5]

Other than § 2462, FERC enforcement actions are not subject to any statutes of limitation—both the Federal Power Act and the Natural Gas Act are silent on limitations periods. *See Prohibition of Energy Mkt. Manipulation*, 114 FERC ¶ 61,047, 61,128 (Jan. 19, 2006). As a result, if § 2462 is read not to cover disgorgement orders, energy companies and other market participants will face substantial uncertainty as to whether long-past conduct will be subject to disgorgement. Furthermore, upholding the Tenth Circuit's decision will sanction the SEC's aggressive use of the disgorgement remedy, providing a model for FERC to expand its enforcement tools.

D. The Federal Trade Commission (FTC)

The FTC has been direct in its intent to use disgorgement to avoid limitations on its ability to penalize long-past conduct.

In the past, the FTC's use of monetary equitable remedies was limited by the analytical framework set forth in its *Policy Statement on Monetary Equitable Remedies in Competition Cases*. 68 Fed. Reg. 45,820 (Aug. 4, 2003). In 2012, however, the FTC withdrew that guidance, noting that "Supreme Court jurisprudence has increased burdens on plaintiffs, and legal thinking has begun to encourage greater seeking of disgorgement."

---

[5] Although these courts analyzed whether FERC disgorgement orders were "penalties," they did not analyze whether those orders were "forfeitures."

FTC, Statement of the Commission (July 31, 2012). Consistent with the new guidance, the FTC has aggressively pursued disgorgement, including for conduct outside the five-year limitations period of § 2462. *See* FTC, Dissenting Statement of Comm'r Ohlhausen (Apr. 17, 2015) (dissenting from FTC's decision in 2015 to pursue disgorgement against Cardinal Health based on its allegedly monopolistic conduct between 2003-2008—despite the lack of any clear violation and the inability to calculate damages with any certainty).

Even before the FTC's recent shift in enforcement strategy, its disgorgement and restitution orders had the effect of punishing defendants. Instead of basing its calculations on the defendant's profits or unjust enrichment, the FTC calculates the amount of disgorgement or restitution as the amount paid by consumers, offsetting only for direct refunds. *See, e.g.*, *FTC* v. *Figgie Int'l*, 994 F.2d 595, 606 (9th Cir. 1993) (affirming restitution order of up to $49.95 million for fraudulent heat detectors); *FTC* v. *Slimamerica, Inc.*, 77 F. Supp. 2d 1263, 1276 (S.D. Fla. 1999) (ordering restitution of $9 million for fraudulent sale of weight loss and other pills).[6] The FTC certainly has the authority to seek such remedies. *See* 15 U.S.C. § 53(b) (authorizing injunctive relief); *id.* § 57b(b) ("The court ... shall have jurisdiction to grant such relief as the court finds necessary to redress injury to consumers .... Such relief may include, but shall not be limited to, rescission or

---

[6] *See also FTC* v. *AMG Servs., Inc.*, 2016 WL 5791416, at *12 (D. Nev. Sept. 30, 2016) (ordering restitution of $1.3 billion, calculated by totaling all finance charges paid on payday loans and applying presumption that every consumer actually relied on the misleading loan disclosures).

reformation of contracts, [and] the refund of money or return of property[.]"). But such remedies should be recognized as equivalent to civil penalties or forfeitures, and thus subject to the five-year limitations period of § 2462, unless Congress expressly provides otherwise.

E. The Food and Drug Administration (FDA)

Invoking the courts' equitable power to "restrain violations" of the Federal Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. § 332(a), the FDA has had success in obtaining significant disgorgement orders. *See United States* v. *Lane Labs-USA Inc.*, 427 F.3d 219, 234 (3d Cir. 2005) (discussing consent decrees ordering disgorgement with Abbott Labs ($100 million), Wyeth-Ayerst ($30 million), and Schering-Plough ($500 million)).[7]

Courts have generally affirmed the FDA's ability to seek disgorgement.[8] The FDA's use of restitution and

---

[7] The FDCA "does not provide a statute of limitations." *United States* v. *Scenic View Dairy, LLC.*, 2011 WL 3879490, at *18 (W.D. Mich. Sept. 1, 2011) (the FDCA itself does not provide a statute of limitations). As a result, § 2462 provides the only time limit on civil actions brought under the statute. *Cf. United States* v. *Caputo*, 288 F. Supp. 2d 912, 919 (N.D. Ill. 2003) (applying five-year default statute of limitations for criminal actions, 18 U.S.C. § 3282, in prosecution involving violations of the FDCA).

[8] *E.g.*, *United States* v. *Rx Depot, Inc.*, 438 F.3d 1052, 1061 (10th Cir. 2006) (reversing district court order denying disgorgement of profits from company selling Canadian prescription drugs); *Lane Labs-USA Inc.*, 427 F.3d at 236 (affirming district court order granting restitution to purchasers of unapproved drugs); *United States* v. *Universal Mgmt. Servs., Corp.*, 191 F.3d 750, 764 (6th Cir. 1999) (affirming district court order granting restitution to purchasers of unapproved medical device); *but see United States* v. *Ten Cartons, Ener-B Nasal Gel*, 888 F. Supp. 381, 404 (E.D.N.Y.) ("Disgorgement, in the Court's view, will

disgorgement, however, has engendered substantial debate. *See Lane Labs-USA Inc.*, 427 F.3d at 234-235 (citing articles). As courts and commentators have recognized, disgorging profits or requiring restitution operates as a harsh remedy—in some cases as serious as the FDA's ultimate remedy of seizure. *See United States* v. *C.E.B. Prods., Inc.*, 380 F. Supp. 664, 668 (N.D. Ill. 1974) ("This passage strongly suggests that the House, at least, considered seizure to be the most severe remedy and that injunctive proceedings were viewed as a means to alleviate the hardships seizures might cause to manufacturers."); Vodra & Levine, *Anchors Away: The Food and Drug Administration's Use of Disgorgement Abandons Legal Moorings*, 59 Food & Drug L.J. 1 (2004) (arguing that FDA's use of disgorgement is punitive and illegal).

In short, numerous federal agencies can and do use disgorgement to punish misconduct. The Court should look to the practical effect of disgorgement orders—not their label as "equitable"—and recognize them as the penalties and forfeitures they are.

II. The Court Of Appeals' Reading Of Section 2462 Is Unfair And Harmful To Businesses

As a practical matter, disgorgement is one of the most significant remedies available to government agencies, often vastly outstripping the dollar value of civil penalties imposed. *See, e.g.*, CFPB, *Factsheet: Enforcing Federal Consumer Protection Laws* at 1 (July 13, 2016) ($11.7 billion in disgorgement and restitution orders; $440 million in civil penalties); Press Release, No. 7488-16, *CFTC Releases Annual Enforcement*

---

only serve a punitive purpose and is not appropriate or necessary."), *aff'd on other grounds*, 72 F.3d 285 (2d Cir. 1995).

Results for Fiscal Year 2016 (Nov. 21, 2016) ($543 million in disgorgement and restitution orders; $748 million in civil penalties); FTC, *Stats & Data 2015*, at 3 ($2 billion in redress and disgorgement; $21.8 million in civil penalties); SEC, *Select SEC and Market Data Fiscal 2016*, at 2 ($2.8 billion in disgorgement orders; $1.3 billion in civil penalties). As a consequence, if only civil penalties and fines are subject to § 2462's limitations period, companies will never have repose from much of the liability they face. Indeed, because agencies can readily replicate civil penalties by pursuing aggressive theories of liability, the Tenth Circuit's reading of § 2462 renders the statute largely irrelevant.

This is not an outcome intended by Congress or sanctioned by the Court. As the Court has recognized, without a statute of limitations, businesses are left "exposed to Government enforcement action not only for five years after their misdeeds, but for an additional uncertain period into the future." *Gabelli* v. *SEC*, 133 S. Ct. 1216, 1223 (2013); *see also United States* v. *Kubrick*, 444 U.S. 111, 117 (1979) ("'[T]he right to be free of stale claims in time comes to prevail over the right to prosecute them.'"); *Adams* v. *Woods*, 6 U.S. (2 Cranch) 336, 342 (1805) (reasoning that permitting an action for debt to "be brought at any distance of time ... would be utterly repugnant to the genius of our laws. In a country where not even treason can be prosecuted after a lapse of three years, it could scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture."). In addition to providing much needed certainty to businesses, statutes of limitation promote effective enforcement of the law, by focusing agencies on responding to fresh cases and uncovering ongoing misconduct.

These general concerns are compounded by enforcement practices that further increase the level of uncertainty and unfairness to businesses.

First, agencies often seek to impose liability, including disgorgement, based on retroactive interpretations of the law. For example, until 2011, private equity advisers were not required to register with the SEC under the Investment Advisers Act of 1940. *See* 17 C.F.R. 275.203A-1; 76 Fed. Reg. 42,950, 42,951 (July 19, 2011). Despite this, the SEC proceeded to launch a series of enforcement actions against private equity advisers for long-past conduct that, in many cases, ended *before* the new regulation came into effect. *See, e.g., In re Blackstreet Capital Mgmt. LLC*, SEC Release No. 77959 (June 1, 2016) (requiring disgorgement of over $2.5 million and imposing $500,000 civil penalty for conduct from 2005 to 2012); *In re Kohlberg Kravis Roberts & Co. LP*, SEC Release No. 4131 (June 29, 2015) (requiring disgorgement of over $18 million and imposing a $10 million civil penalty for conduct from 2006 to 2011).[9] Likewise, the CFPB has attempted to apply retroactive interpretations of various consumer protection laws in seeking disgorgement—although it has not had much success in court. *See, e.g., PHH Corp* , 839 F.3d at 46 (rejecting argument that 2015 interpretation of Real Estate Settlement Practices Act should be applied to conduct starting in 2008); *CFPB* v. *Gordon*, 819 F.3d 1179, 1195 (9th Cir. 2016) (petition for certiorari docketed) (reversing and remanding $11 million disgorgement

---

[9] *See also* Press Release No. 2015-245, *SEC Announces Enforcement Results For FY 2015* (Oct. 22, 2015) (characterizing enforcement action against Kohlberg Kravis Roberts & Co. as "first-of-[its]-kind").

order against attorney providing home loan modification services, where CFPB sought retroactive application of regulation). The propensity of agencies to seek retroactive application of the law and to shift their enforcement priorities underscores the need for a predictable and firm limit on an agency's ability to reach into the past.

Second, contrary to the SEC's characterization of disgorgement as a non-punitive equitable remedy in this case, the SEC and other agencies have successfully argued that a disgorgement order is not dischargeable in bankruptcy, as a "fine, penalty, or forfeiture payable to and for the benefit of a governmental unit." 11 U.S.C. § 523(a)(7); *see In re Telsey*, 144 B.R. 563 (Bankr. S.D. Fla. 1992).[10] In accepting the SEC's argument that disgorgement is a nondischargeable "fine, penalty, or forfeiture," one court explained that the "deterrence purpose" of disgorgement is "sufficiently penal to characterize the resulting debt as a 'fine, penalty, or forfeiture.'" 144 B.R. at 565. Similarly, the IRS has taken the position that disgorgement orders may be nondeductible, "punitive" debts where the order "serves primarily to prevent wrongdoers from profiting from their illegal conduct and deters subsequent illegal

---

[10] *See also, e.g., In re Towers*, 162 F.3d 952, 955 (7th Cir. 1998) ("It is easy enough to call restitution under the Illinois Consumer Fraud and Deceptive Business Practices Act 'a fine, penalty, or forfeiture.'"); *HUD* v. *Cost Control Mktg. & Sales Mgmt. of Virginia, Inc.*, 64 F.3d 920, 928 (4th Cir. 1995) ($8.65 million disgorgement order obtained by Department of Housing and Urban Development not dischargeable in bankruptcy, because government's interest in enforcing debt was "penal"); *In re Jensen*, 395 B.R. 472, 484 (Bankr. D. Colo. 2008) ($228,836 disgorgement order obtained by State of Colorado not dischargeable in bankruptcy, because of "penal and deterrence goals" of Colorado consumer protection statutes).

conduct." IRS, Office of Chief Counsel, Memorandum, No. 201619008, at 9 (May 6, 2016) (addressing disgorgement order sought by SEC under the Foreign Corrupt Practices Act). The IRS noted that "cases that impose disgorgement as a discretionary equitable remedy can have similarities to some cases that impose forfeiture as required by statute." *Id.*

The government should not be permitted to pick and choose when its disgorgement orders are penalties or forfeitures by advancing contradictory interpretations of the same language in different statutes. *See Christianson* v. *Colt Indus. Operating Corp.*, 486 U.S. 800, 808 (1988) ("[l]inguistic consistency" requires reading identical language in different statutes the same); *Northcross* v. *Board of Ed. of Memphis City Schs.*, 412 U.S. 427, 428 (1973) (per curiam) ("similarity of language" is "strong indication" that statutes should be interpreted together, particularly where "'the two provisions share a common raison d'etre'"). When considered together, the contradictory interpretation of these two "fine, penalty, or forfeiture" provisions would allow agencies to impose nondischargeable monetary obligations without any time restriction and without regard to whether the defendant himself ever obtained or still holds the monies ordered disgorged. It should not be lightly assumed that Congress intended to impose such a draconian burden on those subject to disgorgement and restitution orders.

Third, agency efforts to circumvent § 2462 are exacerbated by the permissive standard of proof for calculating disgorgement damages. A central policy of statutes of limitation is that "they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of

witnesses, fading memories, disappearance of documents, or otherwise." *Kubrick*, 444 U.S. at 117. Typically, these evidentiary issues affect the ability of both the defense and the prosecution to effectively litigate. Indeed, in a criminal case, the "passage of time may make it difficult or impossible for the Government" to carry its burden of proving its case beyond a reasonable doubt. *United States* v. *Loud Hawk*, 474 U.S. 302, 315 (1986).

Not so with disgorgement. In seeking disgorgement, an agency only needs to propose a "reasonable approximation" of the profits, which "creates a presumption of illegal profits." *SEC* v. *Teo*, 746 F.3d 90, 105 (3d Cir. 2014). The defendant may seek to show that the calculation is inaccurate, but he bears the risk of uncertainty. *Id.* Rebutting an agency's "reasonable approximations" is already difficult for defendants. *See SEC* v. *First City Fin. Corp.*, 890 F.2d 1215, 1231 (D.C. Cir. 1989) ("Unfortunately, we encounter imprecision and imperfect information. Despite sophisticated econometric modelling, predicting stock market responses to alternative variables is, as the district court found, at best speculative. Rules for calculating disgorgement must recognize that separating legal from illegal profits exactly may at times be a near-impossible task."); *see also Gordon*, 819 F.3d at 1196 (approximating amount of disgorgement at the full value of unlawful legal services provided, and putting burden on defendant to show that consumers were "satisfied" with their services, received refunds, or did not rely on fraudulent statements). But when enforcement actions are brought years after the fact, it may be all but impossible for the defendant to trace the chain of causation and segregate legitimate profits. In effect, the defendant must bear not only the uncertainty

created by his misconduct, but by the government's delay. Accordingly, because of this reversal of the typical burdens, it is even more critical for § 2462's limitations period to apply to disgorgement.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the Tenth Circuit.

Respectfully submitted.

KATE COMERFORD TODD
STEVEN P. LEHOTSKY
JANET GALERIA
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

STACY LINDEN
PETER TOLSDORF
AMERICAN PETROLEUM INSTITUTE
1220 L Street, NW
Washington, DC 20005

MATTHEW T. MARTENS
Counsel of Record
JOHN BYRNES
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
matthew.martens@wilmerhale.com

MARCH 2017

RECORD AND BRIEF

No. 16-529

FILED
MAR - 3 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

CHARLES R. KOKESH,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR MARK CUBAN AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

ALEX LIPMAN
JUSTIN S. WEDDLE
ASHLEY L. BAYNHAM
BROWN RUDNICK LLP
Seven Times Square
New York, NY 10036
(212) 209-4800

STEPHEN A. BEST
Counsel of Record
BROWN RUDNICK LLP
601 Thirteenth Street, NW
Washington, DC 20005
(202) 536-1700
sbest@brownrudnick.com

Counsel for Amicus Curiae

271480

Library of Congress

TABLE OF CONTENTS

Page

TABLE OF CONTENTS. i

TABLE OF CITED AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT. 2

ARGUMENT. 5

I. THE OPERATIVE STATUTES GOVERN THE RELIEF THE SEC MAY SEEK AND FEDERAL DISTRICT COURTS CAN ORDER. 5

II. THIS COURT'S BINDING PRECEDENTS GOVERN HOW TO INTERPRET THE SEC'S "EQUITABLE RELIEF" STATUTE. 9

III. APPLICATION OF SECTION 2462'S LIMITATIONS PERIOD DEPENDS ON THE TRUE CHARACTER OF RELIEF REQUESTED. 17

CONCLUSION 24

TABLE OF CITED AUTHORITIES

Page

CASES

Adams v. Woods,
2 Cranch 336 (1805) 18

Cincinnati Soap Co. v. United States,
301 U.S. 308 (1937) 9

Cont'l Grain Co. v. The FBL-585,
364 U.S. 19 (1960) 18

FTC v. Bronson Partners, LLC,
654 F.3d. 359 (2d Cir. 2011) 3

Gabelli v. SEC,
133 S. Ct. 1216 (2013) 18

Great-West Life & Annuity Insurance Company v. Knudson,
534 U.S. 204 (2002) ..... *passim*

Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.,
527 U.S. 308 (1999) ..... *passim*

Kokkonen v. Guardian Life Ins. Co. of Am.,
511 U.S. 375 (1994) 7

Mertens v. Hewitt Assocs.,
508 U.S. 248 (1993) 11, 14

Cited Authorities

Page

Pennoyer v. Neff,
95 U.S. 714 (1877) 19

SEC v. Contorinis,
743 F.3d 296 (2d Cir. 2014) 15

SEC v. Graham,
823 F.3d 1357 (11th Cir. 2016) 18

SEC v. Kokesh,
834 F.3d 1158 (10th Cir. 2016) 15, 18

SEC v. Kokesh,
No. 09-cv-1021 SMV/LAM,
2015 WL 11142470 (D.N.M. Mar. 30, 2015) 2

SEC v. Lipson,
278 F.3d 656 (7th Cir. 2002) 11

SEC v. Texas Gulf Sulphur Co.,
446 F.2d 1301 (1971) 6

Sereboff v. Mid Atlantic Med. Servs., Inc.,
547 U.S. 356 (2006) 13

Tooele Cty. v. United States,
820 F.3d 1183 (10th Cir. 2016) 19

United States v. Oncology Assocs.,
198 F.3d 489 (4th Cir. 1999) 22

Cited Authorities

Page

United States v. Sum of $70,990,605,
991 F. Supp. 2d 144 (D.D.C. 2013). 19

Wood v. Carpenter,
101 U.S. 135 (1879) 18

STATUTES AND OTHER AUTHORITIES

15 U.S.C. § 77h-1 . . . . . 7, 8

15 U.S.C. § 77t 2, 7

15 U.S.C. § 78u 7

15 U.S.C. § 78u-1 7

15 U.S.C. § 78u-2 . . . . . 7, 8

15 U.S.C. § 78u-3 . . . . . 5, 6, 7, 8

15 U.S.C. § 78u-5 . . . . . *passim*

15 U.S.C. § 80a-41 2

15 U.S.C. § 80b-9 2

15 U.S.C. § 7243 5

15 U.S.C. § 7246 9

Cited Authorities

Page

28 U.S.C. § 2462 ..... *passim*

29 U.S.C. § 1132 10

1 D. Dobbs, Law of Remedies (2d ed. 1993) 11

5 A. Corbin, Contracts (1964) 11

D. Dobbs, The Law of Torts (2d ed. 2016) 21

Restatement (First) of Restitution (1936) 12, 23

Restatement (Third) of Restitution (2011) 23

Russell G. Ryan, *The Equity Façade of SEC Disgorgement*, Harv. Bus. L. Rev. Online, Nov. 2013 ..... *passim*

Sec. & Exchange Comm'n, Select SEC and Market Data Fiscal 2009 (2009) 16

Sec. & Exchange Comm'n, Select SEC and Market Data Fiscal 2010 (2010) 16

Sec. & Exchange Comm'n, Select SEC and Market Data Fiscal 2011 (2011) 16

Sec. & Exchange Comm'n, Select SEC and Market Data Fiscal 2012 (2012) 16

Cited Authorities

Page

Sec. & Exchange Comm'n, Select SEC and Market Data Fiscal 2013 (2013) 16

Sec. & Exchange Comm'n, Select SEC and Market Data Fiscal 2014 (2014) 16

Sec. & Exchange Comm'n, Select SEC and Market Data Fiscal 2015 (2015) 16

Sec. & Exchange Comm'n, Select SEC and Market Data Fiscal 2016 (2016) 16

What We Do, Sec. & Exch. Comm'n [website] 1

INTEREST OF *AMICUS CURIAE*[1]

Mark Cuban is a successful businessman and investor who defeated an attempt by the U.S. Securities and Exchange Commission (the "SEC") to sanction him as an "insider trader" based on an incorrect legal theory and defective facts. As a first-hand witness to and victim of SEC overreach, Mr. Cuban has an interest in supporting Petitioners' appeal in this case, and in particular demonstrating that Congress has never given to the SEC the power it has attempted to arrogate to itself—the power to obtain draconian remedies labelled "disgorgement" that are unbounded by statutes of limitations, governing statutes, or this Court's binding precedents.

According to its website, "[t]he mission of the U.S. Securities and Exchange Commission is to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation."[2] When the SEC usurps power that has not been expressly delegated to it by Congress, capital formation is impeded because market participants do not have clear rules for understanding their investment risks. Put differently, investment risk from arbitrary securities law enforcement is no less a threat to capital formation than investment risk resulting from lax enforcement; they are two sides of the same coin.

---

1. Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae* or his counsel made a monetary contribution intended to fund the preparation or submission of this brief. Both parties have consented to the filing of this brief.

2. *What We Do*, Sec. & Exch. Comm'n, http://www.sec.gov/about/whatwedo.shtml (last visited Mar. 2, 2017).

As a businessman who has faced down a misguided and defective SEC enforcement action, Mr. Cuban has an abiding interest in challenging the SEC when it takes positions unmoored from governing law and precedent. Here, the SEC has done exactly that in claiming that it can obtain as "disgorgement" a money judgment against defendants, plus crippling prejudgment interest, without regard to the time period that has passed between the time of the alleged violation and the time the SEC chose to bring its case, and also without regard to whether the SEC has satisfied the established requirements of equity jurisprudence for obtaining equitable relief.

SUMMARY OF ARGUMENT

The question presented in this case is whether "the five-year statute of limitations in 28 U.S.C. § 2462 appl[ies] to claims for 'disgorgement.'" However, the governing securities statutes do not provide for any federal court remedy of "disgorgement." Rather, they permit courts to order a "civil penalty" subject to various limitations, and "equitable relief that may be appropriate or necessary for the benefit of investors." *See* 15 U.S.C. § 78u(d)(3) (providing for civil monetary penalties for securities law violations)[3]; 15 U.S.C. § 78u(d)(5) (providing for equitable relief for parallel securities law violations). The federal

---

3. *See also* Securities Act of 1933 § 20(d), 15 U.S.C. § 77t(d) (same); Investment Advisors Act of 1940 § 209(e), 15 U.S.C. § 80b-9(e) (same); Investment Company Act of 1940 § 43(e), 15 U.S.C. § 80a-41(e) (same). Note, in *SEC v. Kokesh*, the cited authority for the civil penalties was under the Securities Exchange Act, Investment Advisers Act, and Investment Company Act. *SEC v. Kokesh*, No. 09-cv-1021 SMV/LAM, 2015 WL 11142470, *11 (D.N.M. Mar. 30, 2015).

securities laws do not permit the SEC to obtain monetary relief unless it fits into one of those two categories of remedies. If "disgorgement" describes a civil penalty, the Section 2462 statute of limitations applies, as all sides here agree. If "disgorgement" in this case instead describes true "equitable relief," then this Court is called upon to determine whether that relief is a "forfeiture" under Section 2462. In other words, a necessary predicate to analyzing the question presented is determining whether the remedy sought in a particular case under the label of "disgorgement" is a "civil penalty" or "equitable relief." So far, the SEC and various lower court decisions have all sidestepped addressing this issue head-on or have approached the issue in a manner unconstrained by the governing statutory language, and in disregard of this Court's binding precedent in *Great-West Life & Annuity Insurance Company. v. Knudson*, 534 U.S. 204 (2002), which defined the term "equitable relief" as it appears in the United States Code and explained its meaning. *See, e.g.*, *FTC v. Bronson Partners, LLC*, 654 F.3d. 359, 369-375 (2d Cir. 2011) (post-*Great-West* decision substantively relying on pre-*Great-West* Second Circuit precedent).

Here, it appears that most, if not all, of the remedy ordered falls outside of the established limits of "equitable relief," since it goes beyond an order requiring the turnover of specifically identified property that the defendant obtained by wrongdoing. *See Great-West*, 534 U.S. at 213 (equitable relief is available only for the return of "money or property identified as belonging in good conscience to the plaintiff [that] could clearly be traced to particular funds or property in the defendant's possession" (citations omitted)). Thus, the remedy the SEC sought here is not,

in fact, "equitable relief." Moreover, the remedy also falls outside of the confines of the applicable "equitable relief" statute because it constitutes a money judgment in favor of the U.S. Treasury, not equitable relief "for the benefit of investors." *See* 15 U.S.C. § 78u(d)(5). Accordingly, the only permissible statutory basis for the order is that providing for civil penalties, which the SEC concedes is subject to the five-year statute of limitations established in Section 2462.

If any part of the relief requested here falls within the established and limited meaning of "equitable relief" as interpreted in *Great-West* and other decisions, then the answer to the question presented lies in an analysis of whether an order requiring the turn-over of specifically identified property constitutes a "forfeiture" under Section 2462. The Petitioner has argued persuasively that it does. But even if it did not, where "equitable relief" is properly understood to describe only an order regarding specifically identified property, not only would the equitable defense of laches apply to a stale claim, but also the character of the relief itself naturally would tend to eliminate stale claims both as a matter of fact and of proof—as time passes, the likelihood that a defendant would still hold tainted property, or that evidence would exist to permit the SEC to prove direct tracing of ill-gotten assets, would diminish.

ARGUMENT

I. THE OPERATIVE STATUTES GOVERN THE RELIEF THE SEC MAY SEEK AND FEDERAL DISTRICT COURTS CAN ORDER.

The SEC is authorized by Congress to seek and federal courts are authorized to grant monetary relief pursuant to statutory provisions authorizing the imposition of *money penalties, see, e.g.*, 15 U.S.C. § 78u(d)(3), or the statutory provision authorizing *"equitable relief" for the benefit of investors*, 15 U.S.C. § 78u(d)(5).[4] None uses the term "disgorgement." The statutory authorization to order civil penalties reads, in relevant part:

> [T]he Commission may bring an action in a United States district court to seek, and the court shall have jurisdiction to impose, upon a proper showing, a civil penalty to be paid by the person who committed such violation.
>
> (B) Amount of penalty. – . . . .
>
> (iii) Third tier.– . . . the amount of the penalty for each such violation shall not exceed the greater of (I) $100,000 for a natural person or $500,000 for any other person, or (II) the gross amount of pecuniary gain to such defendant as a result of the violation . . . .

4. To be sure, there are other statutory provisions that provide for limited, specific forms of monetary relief not relevant here, such as the so-called "clawbacks" of executive compensation from individuals when public companies restate financial results. *See, e.g.*, 15 U.S.C. § 7243 (2012) ("Forfeiture of Certain Bonuses and Profits").

Exchange Act of 1934 § 21(d)(3), 15 U.S.C. § 78u(d)(3).[5]

Section 305 of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley") added the provision that allows obtaining additional monetary relief in the form of "equitable relief." This provision, added to the Securities Exchange Act of 1934, states:

> Equitable Relief.—In any action or proceeding brought or instituted by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors.

15 U.S.C. § 78u(d)(5). Prior to Sarbanes-Oxley there was no explicit provision for equitable monetary relief in the securities laws, so federal courts implied the equitable power to order monetary relief, variously styled "restitution" or "disgorgement," for violations of the securities laws. *See, e.g., SEC v. Tex. Gulf Sulphur Co.*, 446 F.2d 1301, 1307-08 (1971) (ordering defendants to pay "restitution" under Section 21(e) of the Exchange Act that allowed for injunctive relief and reasoning that the SEC may seek restitution without express statutory authority "as an ancillary remedy in the exercise of the courts' general equity powers to afford complete relief"). *See generally* Russell G. Ryan, *The Equity Façade of SEC Disgorgement*, Harv. Bus. L. Rev. Online, Nov. 2013, at 2-3, http://www.hblr.org/2013/11/the-equity-facade-of-sec-disgorgement/ [hereinafter "*The Equity Façade*"]

---

5. *See supra* note 3.

("Congress has never explicitly included disgorgement among the remedies the SEC can seek in federal court. Despite this silence, the SEC has been seeking disgorgement for decades, and courts have been granting it for nearly as long. . . . Over time, courts came to accept as a truism the notion that disgorgement is inherently an ancillary equitable remedy.").

In other words, Sarbanes-Oxley codified the federal courts' ability to grant monetary relief, but subjected it to two important limitations: first, Congress used the phrase "equitable relief" to describe the power granted, which is a phrase with defined parameters; and second, the statute granted the power only where it "may be appropriate or necessary for the benefit of investors." 15 U.S.C. § 78u(d)(5). These statutory limitations are binding. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (holding that federal courts, being courts of "limited jurisdiction," "possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree" (citations omitted)). Thus, any "disgorgement" order under this provision must meet this Court's description of what constitutes "equitable relief" and it may not be obtained for the purpose of being paid over to the treasury.[6]

---

6. In parallel, the SEC is specifically authorized by Congress to seek "accounting and disgorgement" in administrative proceedings. *Compare* 15 U.S.C. §§ 77h-1, 78u-2, 78u-3 (administrative proceeding remedies) *with* 15 U.S.C. §§ 77t, 78u, 78u-1 (federal court remedies). It is not clear that Congress could vest in the SEC the same equitable powers possessed by federal courts. *See Equity Façade, supra*, at 2-3 n.12, 11 ("By explicitly authorizing disgorgement as an administrative remedy, capable of being ordered by an independent executive branch agency carrying out its law enforcement functions,

Congress's addition of the "Fair Funds" provision, as part of Sarbanes-Oxley, further demonstrates that 15 U.S.C. § 78u(d)(5) is limited to equitable relief for the benefit of identifiable investor-victims. That provision states:

> If, in any judicial or administrative action brought by the Commission under the securities laws, the Commission obtains a civil penalty against any person for a violation of such laws, or such person agrees, in settlement of any such action, to such civil penalty, the amount of such civil penalty shall, on the motion or at the direction of the Commission, be added to and become part of a disgorgement fund or other fund established for the benefit of the victims of such violation.

Congress must have recognized that disgorgement is not invariably a remedy in equity. It seems highly doubtful that Congress would—or constitutionally could, consistent with separation of powers—bestow one of the core judicial powers of an Article III court of equity upon a law enforcement agency of the executive branch."). Alternatively, if the SEC has an equitable power of "accounting and disgorgement," it should be governed by established equity jurisprudence. It also appears that Congress intended disgorgement in administrative proceedings to be ordered only when there were specifically identified investors who suffered losses. 15 U.S.C. §§ 77-h1, 78u-2, 78u-3 ("The Commission is authorized to adopt rules, regulations, and orders concerning *payments to investors*, rates of interest, periods of accrual, and such other matters *as it deems appropriate to implement this subsection*." (emphasis added)). In any event, administrative disgorgement would also be a forfeiture within the meaning of Section 2462. *See* Brief of Petitioner at 12-22, *Kokesh v. SEC*, No. 16-529 (Feb. 24, 2017) [hereinafter "Petitioner Brief"]; *infra* III.

15 U.S.C. § 7246(a). The Fair Funds provision reflects a realization that courts need congressional authorization to hand over proceeds of fines and equitable relief to victims. *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937) (holding that the Appropriations Clause "means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress" (citations omitted)). It, therefore, gives effect to the "for the benefit of investors" clause of the equitable relief authorization. This provision also reflects a realization that disgorgement of traced assets obtained as equitable relief under 15 U.S.C. § 78u(d)(5) may be less than what the victims have lost. In that case, a fine up to the amount of gross pecuniary gain by the defendant can be ordered and handed over to the victims. Reading "disgorgement" as unbounded by equity jurisprudence renders this Fair Funds provision redundant.

II. THIS COURT'S BINDING PRECEDENTS GOVERN HOW TO INTERPRET THE SEC'S "EQUITABLE RELIEF" STATUTE.

The phrase chosen by Congress—"equitable relief"—is one that has been carefully and clearly interpreted by this Court in multiple cases, most notably *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002) and *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999). Those precedents are binding here, and establish three things. First, that the term "equitable relief" is a term with limitations. Second, that labelling some requested relief "disgorgement" does not make it "equitable relief." Third, that for an order to turn over money or property to qualify as true "equitable relief," it must be an order to return "money or property

identified as belonging in good conscience to the plaintiff [that] could clearly be traced to particular funds or property in the defendant's possession." *Great-West*, 534 U.S. at 213. In other words, under this Court's precedents, disgorgement of specifically identified property or money traced to the wrongdoing is an equitable remedy. Disgorgement of non-traceable assets is an order to pay money damages; it is a legal remedy unavailable under 15 U.S.C. § 78u(d)(5), and thus only permitted as an order for "civil penalties" under the civil penalties provisions.

The leading case here is *Great-West*, which establishes the methodology for determining the character of a remedy, and defines the types of money- and property-related orders that qualify as "equitable relief." Great-West Life & Annuity Insurance Company sued a medical insurance policy beneficiary for reimbursement of covered medical expenses under Section 502(a)(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(a)(3). *Great-West*, 534 U.S. at 208-09. Section 502(a)(3) authorizes civil actions "to obtain other appropriate equitable relief," among other things. *Id.* at 209 (quoting 29 U.S.C. § 1132(a)(3)). Great-West sought to recover from the defendant money that the defendant never held but that the defendant was contractually obligated to pay to Great-West. *Id.* at 207-08. Great-West claimed that the relief it sought was "restitution," which it characterized as a form of equitable relief. *Id.* at 212. The Court was, therefore, called upon to interpret a statutory provision containing almost the exact language as the "equitable relief" provision in the Exchange Act, 15 U.S.C. § 78u(d)(5). In fact, the Court specifically extended its interpretation of "equitable relief" to all statutes containing this language, noting that "the term 'equitable

relief' appears in 77 provisions of the United States Code" and that "Congress felt comfortable referring to equitable relief in [the ERISA] statute—as it has in many others—precisely because the basic contours of the term are well known." *Id.* at 216 & n.3.

The Court first observed that the use of this term, "equitable relief," denoted limitations on the power authorized by the statute. As the Court explained, "'[e]quitable' relief must mean *something* less than *all* relief." *Great-West*, 534 U.S. at 209 (quoting *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 258 n.8 (1993)) (emphasis in *Mertens*).

The Court then indicated that the nature of the remedy, not its label, controls the analysis as to whether the relief sought is equitable. *See id.* at 213 ("[W]hether [the sought remedy] is legal or equitable depends on the basis for the plaintiff's claim and the nature of the underlying remedies sought."). The Court then observed that "restitution" was a label that applied both to equitable and legal relief; restitution is not inherently equitable. *Id.* at 212-13 ("In the days of the divided bench, restitution was available in certain cases at law, and in certain others in equity." (citing 1 D. Dobbs, Law of Remedies § 1.2, at 11; § 4.1(1), at 556; § 4.1(3), at 564-65; §§ 4.2-4.3, at 570-624 (2d ed. 1993); 5 A. Corbin, Contracts § 1102, at 550 (1964)); *see also SEC v. Lipson*, 278 F.3d 656, 663 (7th Cir. 2002) (Posner, J.) (expressly stating that "restitution . . . is both a legal and an equitable remedy").

The Court then proceeded to analyze the particular relief requested by Great-West "under the rubric of restitution" to determine if it was, in substance, equitable

or legal relief. *Great-West*, 534 U.S. at 212-14. The Court explained that a remedy is equitable, as opposed to legal, when the nature of the underlying claim refers to "those categories of relief that were *typically* available in equity." *Id.* at 210 (quoting *Mertens*, 508 U.S. at 256) (emphasis in *Mertens*). *Great-West* explained further that, traditionally, equitable relief has taken the form of "transfer[ring] title (in the case of the constructive trust) or [giving] a security interest (in the case of the equitable lien) to a plaintiff who was, in the eyes of equity, the true owner," and that these traditional forms must guide courts in issuing equitable remedies. *Id.* at 213. In contrast, a remedy is at law "'where the property sought to be recovered or its proceeds have been dissipated so that no product remains, the plaintiff's claim is only that of a general creditor,' and the plaintiff 'cannot enforce a constructive trust of or an equitable lien upon other property of the defendant.'" *Id.* at 213-14 (brackets omitted) (quoting Restatement (First) of Restitution, § 215, Comment (a) (1936)).

Using this analysis, the Court determined that Great-West's claim for "restitution," at its core, was not equitable, but legal, because "the funds to which petitioners claim[ed] . . . an entitlement . . . [were] not in respondents' possession." *Id.* at 225-26. Great-West was not seeking to recover specific traced funds that the insurance beneficiary had obtained, but reimbursement as the fulfillment of a contractual obligation to pay money. *Id.* at 210-12. Put another way, Great-West's claim for restitution was determined to be "at law" because it had the actual result of imposing "personal liability for the benefits that [it] conferred upon respondents," which does not sound in equity but at law. *Id.* at 213-14 (explaining that an order imposing "a merely personal liability upon the

defendant to pay a sum of money . . . [is] essentially [an] action[] at law" (citing Restatement (First) of Restitution, § 160, Comment (a) (1936)).

Accordingly, pursuant to *Great-West*, in order for courts to provide equitable relief in the form of an order to turn over funds or property, the funds or title to property sought must be specifically identified and directly traced as the proceeds of wrongdoing. *Id.* at 213; *see also Sereboff v. Mid Atlantic Med. Servs., Inc.*, 547 U.S. 356, 364-65 (2006) (finding that "strict tracing rules" were applied to equitable restitution historically, such that the right to recover restitution only existed where the proceeds sought were in the defendant's possession).

Great-West is not a unique example of this Court's rigorous application of the limits created by equity jurisprudence. In *Grupo Mexicano*, this Court was presented with "the question whether, in an action for money damages, a United States District Court ha[d] the power to issue a preliminary injunction preventing the defendant from transferring assets in which no lien or equitable interest [was] claimed." *Grupo Mexicano*, 527 U.S. at 310. The Court found that a district court had no such power because such power does not conform to established principles of "equity." *Id.* at 321-27. The Court explained first that "the equitable powers conferred by the Judiciary Act of 1789 did not include the power to create remedies previously unknown to equity jurisprudence. Even when sitting as a court in equity, we have no authority to craft a 'nuclear weapon' of the law like the one advocated here." *Id.* at 332. Relying on "traditional principles of equity," the Court concluded "that the expansive view of equity must be rejected." *Id.* at 319-

21; *see also Great-West*, 534 U.S. at 209 ("'[E]quitable relief' must mean *something* less than *all* relief." (quoting *Mertens*, 508 U.S. at 251) (emphasis in *Mertens*)). Instead, the Court emphasized that the boundaries of traditional equitable relief must restrain courts, as "Congress is in a much better position . . . to perceive . . . and to design appropriate remed[ies]." *Grupo Mexicano*, 527 U.S. at 322 ("To accord a type of relief that has never been available before—and especially (as here) a type of relief that has been specifically disclaimed by longstanding judicial precedent—is to invoke a default rule not of flexibility but of omnipotence." (citation omitted)). The Court held, therefore, that "[b]ecause such a remedy was historically unavailable from a court of equity . . . the District Court had no authority to issue a preliminary injunction preventing petitioners from disposing of their assets pending adjudication of respondents' contract claim for money damages." *Id.* at 333.

In short, this Court's precedents demonstrate that calling "disgorgement" an equitable remedy does not it make it so. There are times when it is—when the disgorged funds are specifically traced.[7] Other times, it plainly is not: it is a legal remedy, a judgment for a sum of money that is to be paid from whatever assets the defendant may possess without regard to their provenance. *See The Equity Façade*, *supra*, at 6-8. Nonetheless, the SEC and many lower courts incorrectly and without analysis adopted as a truism that disgorgement claims are "equitable." *Id.*

---

7. As noted above the statute also requires that any equitable relief be "for the benefit of investors," 15 U.S.C. § 78u(d)(5), which means that the traced assets must be returnable to their rightful owner.

at 3. Petitioners explain in detail that the SEC's use of disgorgement is completely unmoored from the limiting principles of equitable relief enunciated in *Great-West*. Petitioner Brief at 49-62. Once one views the SEC's claim for disgorgement through the analytical prism of *Great-West*, it is clear that the SEC is actually seeking civil penalties under the guise of disgorgement because it makes little, if any, effort to tie the relief ordered to the wrongfully obtained "particular funds or property in the defendant's possession." *Great-West*, 534 U.S. at 213.

Indeed, this incorrect equating of disgorgement with equity, combined with a failure of lower courts to apply either the established limitations on equity or the statutory limits on civil penalties, have resulted in the SEC requesting, and courts granting, powers "not of flexibility but of omnipotence." *See Grupo Mexicano*, 527 U.S. at 322. For example, one court has ordered a defendant to "disgorge" untraced funds that were never "received or controlled" by the defendant, but rather were received by innocent third parties, *see SEC v. Contorinis*, 743 F.3d 296, 310 (2d Cir. 2014), which is precisely the type of non-equitable remedy rejected by *Great-West*. Here too, the Petitioner has been ordered to disgorge funds he never possessed. *SEC v. Kokesh*, 834 F.3d 1158, 1161-62 (10th Cir. 2016), *cert. granted*, No. 16-529, __ S. Ct. __ (2017). The attraction to the SEC of this unlimited "disgorgement" power likely explains the fact that disgorgement orders now often dwarf civil penalty orders.[8]

---

8. Indeed, the SEC has secured as much as $3.019 billion in aggregate disgorgement orders in one fiscal year, and has secured at least $2 billion in aggregate disgorgement orders in each of the last five years—far exceeding the amount of aggregate civil penalties in the same period. *See The Equity Façade*, *supra*, at 1; Sec. &

In sum, this Court's precedents affirm that where the SEC's request for disgorgement is tied to specifically identified, wrongfully obtained money or property, then it is *equitable* and can be ordered under 15 U.S.C. § 78u(d)(5). But where the SEC's request for "disgorgement" is unconnected to specific, wrongfully obtained money or property, then it is in reality just a claim for a money judgment and, therefore, a request for civil penalties authorized by 15 U.S.C. § 78u(d)(3) and other civil penalties provisions. A proper analysis of the substance of the relief requested under the rubric of "disgorgement" simplifies the analysis of the statute of limitations question

---

Exchange Comm'n, Select SEC and Market Data Fiscal 2016, 2 tbl. 1 (2016), https://www.sec.gov/reportspubs/select-sec-and-market-data/secstats2016.pdf ($2.8 billion in disgorgement and $1.3 billion in penalties); Sec. & Exchange Comm'n, Select SEC and Market Data Fiscal 2015, 2 tbl. 1 (2015), https://www.sec.gov/reportspubs/select-sec-and-market-data/secstats2015.pdf ($3.0 billion in disgorgement and $1.2 billion in penalties); Sec. & Exchange Comm'n, Select SEC and Market Data Fiscal 2014, 2 tbl. 1 (2014), https://www.sec.gov/reportspubs/select-sec-and-market-data/secstats2014.pdf ($2.8 billion in disgorgement and $1.4 billion in penalties); Sec. & Exchange Comm'n, Select SEC and Market Data Fiscal 2013, 2 tbl. 1 (2013), https://www.sec.gov/about/secstats2013.pdf ($2.3 billion in disgorgement and $1.2 billion in penalties); Sec. & Exchange Comm'n, Select SEC and Market Data Fiscal 2012, 2 tbl. 1 (2012), https://www.sec.gov/about/secstats2012.pdf ($2.1 billion in disgorgement and $1 billion in penalties); Sec. & Exchange Comm'n, Select SEC and Market Data Fiscal 2011, 2 tbl. 1 (2011), https://www.sec.gov/about/secstats2011.pdf ($1.9 billion in disgorgement and $928 million in penalties); Sec. & Exchange Comm'n, Select SEC and Market Data Fiscal 2010, 2 tbl. 1 (2010), https://www.sec.gov/about/secstats2010.pdf ($1.8 billion in disgorgement and $1 billion in penalties); Sec. & Exchange Comm'n, Select SEC and Market Data Fiscal 2009, 2 tbl. 1 (2009), https://www.sec.gov/about/secstats2009.pdf ($2.1 billion in disgorgement and $345 million in penalties).

presented here, as well as other disputed questions of securities enforcement law.

III. APPLICATION OF SECTION 2462'S LIMITATIONS PERIOD DEPENDS ON THE TRUE CHARACTER OF RELIEF REQUESTED.

Based on this Court's precedents and the applicable statutory language, this Court should separately analyze whether Section 2462's statute of limitations applies, on the one hand, to "civil penalties" under 15 U.S.C. § 78u(d)(3), and on the other hand, to "equitable relief" "for the benefit of investors" under 15 U.S.C. § 78u(d)(5).

Where the SEC seeks disgorgement that is, in truth, a civil penalty, the analysis is simple—all of the statutory and constitutional restrictions on civil penalties apply, including the statute of limitations. It is uncontested and, indeed, is no revelation that Section 2462's statute of limitations applies to civil penalties. In fact, it is in the words of the statute itself:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of *any* civil fine, *penalty*, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

28 U.S.C. § 2462 (emphasis added). *Great-West* and *Grupo Mexicano* show that this restriction on civil penalties

cannot be ignored just because the relief is labeled disgorgement if the relief, in substance, is a civil penalty. The statute of limitations serves a purpose. *See Gabelli v. SEC*, 133 S. Ct. 1216, 1220-21 (2013) (holding that the statute of limitations is considered "vital to the welfare of society" and quoting prior opinions, including one by Chief Justice Marshall, in saying it "'would be utterly repugnant to the genius of our laws' if actions for penalties could 'be brought at any distance of time'" (first quoting *Wood v. Carpenter*, 101 U.S. 135, 139 (1879), then quoting *Adams v. Woods*, 2 Cranch 336, 342 (1805)).

The analysis of true "equitable relief" is less straightforward, but as the Petitioners point out, equitable disgorgement fits comfortably within Section 2462's reference to "forfeiture." Petitioner Brief at 12-22. Indeed, the Tenth Circuit said as much when it defined civil forfeiture in the context of § 2462 "as [a]n *in rem proceeding* brought by the government against property that either facilitated a crime *or was acquired as a result of criminal activity*." *Kokesh*, 834 F.3d at 1165-166 (emphasis added) (quoting Black's Law Dictionary); *see also SEC v. Graham*, 823 F.3d 1357, 1363 (11th Cir. 2016) (concluding that, according to its ordinary meaning, forfeiture "occurs when a person is forced to turn over money or property because of a crime or wrongdoing"). As discussed above, "equitable relief" is only available under 15 U.S.C. § 78u(d)(5) when specific, identified property is being returned to its rightful owner, the investor; it therefore is an *in rem* proceeding, *i.e.*, a proceeding in which the true ownership of the property is determined. *See Cont'l Grain Co. v. The FBL-585*, 364 U.S. 19, 26-27 (1960) (granting joinder of an *in rem* proceeding against property and an action against the owner of that property because "while two methods

were invoked to bring the owner into court and enforce any judgment against it, the substance of what had to be done to adjudicate the rights of the parties was not different at all"); *Pennoyer v. Neff*, 95 U.S. 714, 734 (1877) ("It is true that, in a strict sense, a proceeding *in rem* is one taken directly against property, and has for its object the disposition of the property, without reference to the title of individual claimants; but, in a larger and more general sense, the terms are applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein."); *Tooele Cty. v. United States*, 820 F.3d 1183, 1188 (10th Cir. 2016) ("[I]n rem proceedings affect the interests of all persons in the property."); *United States v. Sum of $70,990,605*, 991 F. Supp. 2d 144, 149-50 (D.D.C. 2013) (finding that a court, while exercising its jurisdiction in an *in rem* action "may adjudicate claims of ownership"). It is also self-evident that any "equitable relief" under 15 U.S.C. § 78u(d)(5) could be authorized only because the subject property was acquired in violation of law. "Equitable relief" under 15 U.S.C. § 78u(d)(5) is, thus, a civil forfeiture, subject to the explicit application of 28 U.S.C. § 2462.

Even if this Court decided that equitable disgorgement of traced assets is not subject to Section 2462's statute of limitations, other limitations apply. For example, the equitable defense of laches applies, especially when the government is standing in the place of the investor in order to seek recompense. *See* Petitioner Brief at 56-61. Moreover, the character of the relief itself would extinguish stale claims as a matter of fact because, as time passes, the prospect that a defendant still holds tainted property steeply diminishes. Furthermore, as a matter of proof, the passage of time diminishes the likelihood

that the SEC (or a plaintiff) can collect and preserve the evidence needed to carry its burden to trace ill-gotten assets.

Other questions, beyond the application of Section 2462's statute of limitations, are also informed by a proper regard for the controlling statutory language and this Court's analysis of the phrase "equitable relief." For example:

- **Prejudgment interest cannot be ordered on equitable remedies.** Properly applied, equity jurisprudence does not permit an order of prejudgment interest on "disgorgement" in the manner routinely requested by the SEC. This is because, applying *Great-West*, the SEC is only statutorily empowered to seek any interest actually earned on the particular funds or property wrongfully obtained in the defendant's possession. *See Great-West*, 534 U.S. at 213-14 & n.2 ("There is a limited exception for an accounting for profits, a form of equitable restitution that is not at issue in this case. If, for example, a plaintiff is entitled to a constructive trust on particular property held by the defendant, he may also recover profits produced by the defendant's use of that property, even if he cannot identify a particular res containing the profits sought to be recovered."). In fact, to the extent there is any reduction in the value of the traced asset or dissipation of traceable funds, the remainder is all that is properly recoverable in equity. *See id.* at 213. The addition of "prejudgment interest" in federal district court enforcement actions does not have a statutory basis or a basis

in equity jurisprudence; it is yet another form of civil penalty.

- **Any disgorgement amount that is not equitable must be considered when calculating the maximum penalty amount under 15 U.S.C. § 78u(d)(3)(B)(iii).** Enforcement actions in federal district court are subject to a maximum penalty of "the gross amount of pecuniary gain to [the] defendant as a result of the violation . . . ." 15 U.S.C. § 78u(d)(3)(B)(iii). Because disgorgement ordered in excess of equity is a civil penalty and because there is no other statutory penalty authority, any amount that is disgorged must be added to the calculation of the maximum penalty amount, unless the disgorgement relates to the return of specifically identified assets to their rightful owners. Otherwise, the SEC is impermissibly circumventing the statutory maximums.

- **Joint and several liability is an improper scheme of recovery for equitable disgorgement orders.** Joint and several liability is nonsensical when applied to orders for equitable disgorgement because while joint and several liability attaches to an individual, as a personal liability, with the prospect that that individual or individuals will pay the whole amount of monetary damages owed, *see* D. Dobbs, The Law of Torts § 487 (2d ed. 2016), equitable disgorgement is an *in rem* remedy that is tied to a specific right in property. *Great-West*, 534 U.S. at 213-14. The recovery scheme cannot be "*in rem*" if one is seeking it either from one person or multiple people, *i.e.*, the concept of joint

and several liability is fundamentally inconsistent with equitable relief, which relates to specifically identified property.

- **Prejudgment asset freeze orders based on the federal court's inherent equitable power have to be limited to true equitable relief.** The lower courts—without analyzing whether remedies sought are legal or equitable—have ordered that most, it not all, of the defendant's assets be frozen prejudgment pursuant to their inherent equitable injunctive powers. The SEC has convinced the lower courts to freeze (i) the gross pecuniary gain, labeled as "disgorgement," (ii) "prejudgment interest," and (iii) the amount of the gross pecuniary gain again, labeled this time as "civil penalties." But in so doing, these lower courts have run afoul of this Court's holding in *Grupo Mexicano*. In *Grupo Mexicano*, this Court held that a lower court could not order an injunction freezing a defendant's assets based on a prejudgment contract claim for money damages because such relief was not traditionally granted by courts of equity. *Grupo Mexicano*, 527 U.S. at 319, 327, 333 (holding that "the District Court had no authority to issue a preliminary injunction preventing petitioners from disposing of their assets pending adjudication of respondents' contract claim for money damages"); *see United States v. Oncology Assocs.*, 198 F.3d 489, 496 (4th Cir. 1999) (interpreting *Grupo Mexicano* to hold that "general equitable authority does not authorize prejudgment injunctions in actions at law"). Therefore, prior to a defendant's assets

being frozen, the government's interest in those assets must be cognizable—equitable, and thus traceable.

- **Relaxed burdens of proof are not "equitable."** Although lower courts have, at times, relaxed the burden of proving "disgorgement" on the (incorrect) view that "disgorgement" is always "equitable," *see The Equity Façade*, *supra*, at 4-5, this relaxation is not grounded in equity jurisprudence. Rather, equity jurisprudence provides that the claimant, here the SEC, bears the burden of proving the specifically identified property to be equitably disgorged. *See* Restatement (First) of Restitution, § 215, Comment (a) (1936) ("The claimant must prove not only that the wrongdoer once had property legally or equitably belonging to him, but that he still holds the property or property which is in whole or in part its product."); *id.* comment (b) ("Burden of proof. A person whose property is wrongfully taken by another is not entitled to priority over other creditors unless he proves that the wrongdoer not only once had the property or its proceeds, but still has the property or its proceeds or property in which the claimant's property or its proceeds have been mingled indistinguishably."); *see also Great-West*, 534 U.S. at 217 ("Rarely will there be need for any more 'antiquarian inquiry' than consulting, as we have done, standard current works such as Dobbs, Palmer, Corbin, and the Restatements, which make the answer clear." (citation omitted)); Restatement (Third) of Restitution, § 58, Comment (a) (2011) (restatement adopted after Sarbanes-Oxley and *Great-West*;

noting that "[t]he common requirement of any claim to asset-based restitution, although differently phrased in the context of each remedy, is that the claimant identify specific property in the hands of the recipient in which the claimant asserts rights of ownership or security").

CONCLUSION

For the foregoing reasons, the Court should resolve the question presented by determining first whether the remedy being sought by the SEC under the rubric of "disgorgement" is, in substance, a penalty or "equitable relief." If the disgorgement at issue here represents legal relief, it is clearly time barred. If the disgorgement at issue here represents "equitable relief," it is also time barred because it is forfeiture within the meaning of the statute of limitations. Alternatively, if the Court finds that the disgorgement at issue here is not forfeiture, all other limitations attendant to prosecuting equity claims should apply, including, among other things, tracing and laches.

Respectfully submitted,

ALEX LIPMAN
JUSTIN S. WEDDLE
ASHLEY L. BAYNHAM
BROWN RUDNICK LLP
Seven Times Square
New York, NY 10036
(212) 209-4800

STEPHEN A. BEST
Counsel of Record
BROWN RUDNICK LLP
601 Thirteenth Street, NW
Washington, DC 20005
(202) 536-1700
sbest@brownrudnick.com

Counsel of Amicus Curiae

Supreme Court, U.S.
FILED
MAR - 3 2016
OFFICE OF THE CLERK

No. 16-529

IN THE
Supreme Court of the United States

CHARLES R. KOKESH,
Petitioner,
v.
SECURITIES AND EXCHANGE COMMISSION.
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF DONALD R. MILLER, JR., IN HIS CAPACITY AS THE INDEPENDENT EXECUTOR OF THE WILL AND ESTATE OF CHARLES J. WYLY, JR., AS *AMICUS CURIAE* SUPPORTING PETITIONER

DEREK L. SHAFFER
QUINN EMANUEL URQUHART & SULLIVAN, LLP
777 6th Street NW
11th Floor
Washington, DC 20001
(202) 538-8000

KATHLEEN M. SULLIVAN
Counsel of Record
ELLYDE R. THOMPSON
QUINN EMANUEL URQUHART & SULLIVAN, LLP
51 Madison Avenue
22nd Floor
New York, NY 10010
(212) 849-7000
kathleensullivan@quinnemanuel.com

March 3, 2017 — *Counsel for Amicus Curiae*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

Page

INTERESTS OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. THE SEC'S USE OF DISGORGEMENT REMEDIES UNLIMITED IN TIME LEADS TO DRACONIAN AND INEQUITABLE RESULTS 5

A. The SEC's Use Of Unlimited Disgorgement Allowed It To Obtain A "Staggering" Award Against The Wylys Reaching Back Over Two Decades 5

B. The SEC's Use Of Unlimited Disgorgement Undermines The Purposes Of Statutes Of Limitations 8

II. THE SEC'S BROAD USE OF DISGORGEMENT IS UNSUPPORTED BY THE HISTORY OF CONGRESS'S LIMITATIONS ON REMEDIES 15

A. At The Time Of Section 2462's Enactment, "Forfeiture" Was Understood As Analogous To "Disgorgement" 16

B. Section 2462 Applies To Disgorgement Awards That Amount To A "Penalty" Within The Meaning Of 28 U.S.C. § 2462 21

CONCLUSION 25

TABLE OF AUTHORITIES

Page

Cases

3M Co. (Minn. Min. & Mfg.) v. Browner,
17 F.3d 1453 (D.C. Cir. 1994) 20

Adams v. Woods,
2 Cranch 336, 2 L.Ed. 297 (1805) 8

Diggs v. Wolcott,
8 U.S. 179 (1807) 17

Gabelli v. SEC,
133 S. Ct. 1216 (2013) 2, 5, 8, 9, 10, 11, 13, 22

Estate of Goodwyn v. C.I.R., T.C. Memo 1976-238,
1976 WL 3423 (1976) 12

Helvering v. Mitchell,
303 U.S. 391 (1938) 17

Horsburg v. Baker,
26 U.S. 232 (1828) 18

McCulloch v. Maryland,
17 U.S. 316 (1819) 17

Rotella v. Wood,
528 U.S. 549 (2000) 5

SEC v. Cavanagh,
445 F.3d 105 (2d Cir. 2006) 21

SEC v. First City Fin. Corp.,
890 F.2d 1215 (D.C. Cir. 1989) 23

SEC v. Fischbach Corp.,
133 F.3d 170 (2d Cir. 1997) 22

SEC v. Graham,
823 F.3d 1357 (11th Cir. 2016) 20

SEC v. Kokesh,
834 F.3d 1158 (10th Cir. 2016) 16, 24

SEC v. Razmilovic,
738 F.3d 14 (2d Cir. 2013) 23

SEC v. Wyly,
56 F. Supp. 3d 260 (S.D.N.Y. 2014) 23

SEC v. Wyly,
56 F. Supp. 3d 394
(S.D.N.Y. 2014) ..... 3, 6, 7 ,10, 12, 22

SEC v. Wyly,
71 F. Supp. 3d 399 (S.D.N.Y. 2014) 7

SEC v. Wyly,
107 F. Supp. 3d 260 (S.D.N.Y. 2015) 8

SEC v. Wyly,
860 F. Supp. 2d 275 (S.D.N.Y. 2012) 11, 13

SEC v. Wyly,
950 F. Supp. 2d 547 (S.D.N.Y. 2013) 5, 6, 7

SEC v. Wyly,
No. 10 CIV. 5760 (SAS), 2013 WL 2951960
(S.D.N.Y. June 13, 2013) 12

The Appollon,
22 U.S. (9 Wheat.) 362 (1824) 17

United States v. 92 Buena Vista Ave.,
507 U.S. 111 (1993) 16

United States v. Bajakajian,
524 U.S. 321 (1998) 18, 19, 22

United States v. Boring,
557 F.3d 707 (6th Cir. 2009) 19

United States v. Casey,
444 F.3d 1071 (9th Cir. 2006) 20

United States v. Contorinis,
692 F.3d 136 (2d Cir. 2012) 19

United States v. Hoover-Hankerson,
511 F.3d 164 (D.C. Cir. 2007) 20

United States v. More,
7 U.S. 159 (1805) 17

United States v. Simms,
5 U.S. 252 (1803) 17

United States v. Ursery,
518 U.S. 267 (1996) 18, 19

United States v. Venturella,
585 F.3d 1013 (7th Cir. 2009) 19

Wood v. Carpenter,
101 U.S. 135 (1879) 13

Wood v. United States,
41 U.S. 342 (1842) 17

Statutes

28 U.S.C. § 2462 ..... 2, 3, 4, 5, 7, 8, 9, 10, 11, 13
..... 15, 16, 18, 20, 21, 22, 23, 24

Act of February 28, 1839,
§ 4, 5 Stat. 322 20

Act of July 31, 1789,
c. 5, s 36, 1 Stat. 29 17

Ct. Rule 37.3(a) 1

Ct. Rule 37.6 1

Miscellaneous

Advanced Estate Planning Practice Update – Summer 2016 Cases, Regulations, and Analyses, http://files.ali-cle.org/thumbs/datastorage/skoobesruoc/pdf/TSXB30_chapter_01_thumb.pdf 12

BLACK'S LAW DICTIONARY (9th ed. 2009) 19

Jeremy Bentham, THE RATIONALE OF PUNISHMENT (Robert Heward ed., 1830) 16

Russell G. Ryan, *The Equity Faade of SEC Disgorgement*, 4 Harv. Bus. L. Rev. Online 10, (2013) 21

SEC, *FY 2017 Congressional Budget Justification, FY 2017 Annual Performance Plan, and FY 2015 Annual Performance Report* (Feb. 9, 2016), https://www.sec.gov/about/reports/secfy17congbudgjust.pdf 15

SEC, *Year-By-Year Monetary Sanctions in SEC Enforcement Actions, available at* https://www.sec.gov/news/newsroom/images/enfstats2.pdf 14

SEC, *Investor Bulletin: How Harmed Investors May Recover Money (*2014), *available at* https://www.sec.gov/oiea/investor-alerts-bulletins/ib_recovermoney.html 22

SEC, *Rules of Practice and Rules on Fair Fund and Disgorgement Plans* (2006), *available at* http://www.sec.gov/about/rulesprac2006.pdf 22

BRIEF OF DONALD R. MILLER, JR., IN HIS CAPACITY AS THE INDEPENDENT EXECUTOR OF THE WILL AND ESTATE OF CHARLES J. WYLY, JR., AS *AMICUS CURIAE* SUPPORTING PETITIONER AND URGING REVERSAL

INTERESTS OF *AMICUS CURIAE*[1]

Amicus curiae the Estate of Charles J. Wyly, Jr., along with Charles Wyly's brother Samuel E. Wyly, are subject to one of the largest disgorgement awards ever against individual defendants in an SEC enforcement action—an award currently on appeal to the U.S. Court of Appeals for the Second Circuit. Early in their careers, the brothers founded a software company that later went public. Over the years, the Wylys acquired a controlling stake in the craft retailer Michaels Stores, Inc., took public the reinsurance company Scottish Re, and served on the boards of directors for numerous companies. In 1992, the Wylys each created trusts in the Isle of Man. In 2010, the SEC brought a civil enforcement action against the Wylys for disclosure

---

[1] Pursuant to this Court's Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae* and counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to this Court's Rule 37.3(a), the Estate notes that all parties have consented to the filing of this brief; their consents have been filed with the Clerk of this Court.

violations dating back to the early 1990s stemming from the treatment of the stocks and options held by these trusts. Charles Wyly died in 2011.

In the Wylys' SEC enforcement action, the district court held that this Court's decision in *Gabelli v. SEC*, 133 S. Ct. 1216, 1220 (2013), barred the SEC from seeking penalties for conduct outside the five-year statute of limitations in 28 U.S.C. § 2462. The district court, however, permitted the SEC to seek disgorgement for conduct dating back to the early 1990s, deeming Section 2462's limitations period inapplicable. Ultimately, the court awarded approximately $300 million in disgorgement and prejudgment interest stretching back nearly twenty-two years. An appeal of the judgment is pending before the Second Circuit. The Estate therefore has a strong interest in supporting petitioner's arguments for treating the disgorgement sought by the SEC as a "forfeiture" and/or "penalty" under 28 U.S.C. § 2462 that is therefore limited to conduct within the five years preceding the SEC's filing of an action.

SUMMARY OF ARGUMENT

Application of 28 U.S.C. § 2462 to SEC actions for disgorgement is necessary to prevent the SEC from undermining the purposes of the statute of limitations that this Court articulated in *Gabelli*. The SEC increasingly has sought larger and larger disgorgement awards for conduct dating back further and further in time, including the $300 million judgment against the Wylys in 2014 for disclosure violations occurring as far back as the early 1990s. The district court recognized that the award against the Wylys is "staggering and among the largest awards ever imposed against

individual defendants," *SEC v. Wyly*, 56 F. Supp. 3d 394, 433 (S.D.N.Y. 2014), and "equivalent to approximately 10% of the total penalties and disgorgement ordered in SEC enforcement cases nationwide [in 2013]," *id.* at 433 n.242. The SEC should not be able to avoid the force of Congress's time limit through the simple expedient of styling the remedy "disgorgement." The history of the treatment of Section 2462 demonstrates that no reason exists to treat what the SEC terms "disgorgement" any differently from a forfeiture or penalty.

I. In rejecting a discovery rule for accrual of the statute of limitations in Section 2462 where the SEC seeks penalties, this Court noted that the SEC has the responsibility and tools to investigate violations of securities laws in order to bring enforcement actions within a reasonable time period. In the case of the Wylys, the SEC failed for more than a decade to request information from the Wylys or to investigate the relationship between the Wylys and the overseas trusts that were later at issue in the enforcement action, despite public information concerning the Wylys' interest in the trusts. When the district court rejected the SEC's request to toll the statute of limitations, the SEC sought disgorgement under a dizzying array of theories. Ultimately, the district court picked two alternative theories and awarded hundreds of millions of dollars in disgorgement and prejudgment interest dating back twenty-two years.

The Wylys' case demonstrates that the SEC's use of disgorgement runs contrary to the purposes underlying the statute of limitations in Section 2462. The judgment permits a nearly $300 million recovery for

conduct long-since past under a so-called "tax-avoidance" theory, which depended upon a novel interpretation of the tax laws. The SEC should not be permitted to fail to investigate violations for an extended period, to re-interpret earlier-existing laws, and to characterize "ill-gotten gains" so loosely as to encompass virtually any amount the SEC chooses—all without any limitation to the Section 2462 time period. Such draconian and inequitable results not only reward the SEC for its nonfeasance but leave individuals exposed to liability for an unlimited period of time, contrary to the purposes of statutes of limitations.

II. The history of Section 2462 does not support the SEC's avoidance of the statute of limitations through the framing of the remedy as equitable "disgorgement" as opposed to a penalty or forfeiture. Forfeiture and the SEC's version of "disgorgement" are synonymous. Even assuming that disgorgement is remedial, Section 2462 does not limit "forfeitures" to punitive rather than remedial forfeitures, which have antecedents going back to the early days of the republic. And any interpretation of Section 2462 as extending only to actions for "penalties" and punitive forfeitures still would cover the SEC's use of disgorgement as a general matter and particularly based on facts like those in the Wylys' case, where the disgorgement lacks any close causal nexus to the violations.

ARGUMENT

I. THE SEC'S USE OF DISGORGEMENT REMEDIES UNLIMITED IN TIME LEADS TO DRACONIAN AND INEQUITABLE RESULTS

As this Court explained in *Gabelli*, the statute of limitations in Section 2462 advances basic policies of "repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." 133 S. Ct. at 1221 (quoting *Rotella v. Wood*, 528 U.S. 549, 555 (2000)). The SEC's increasing pursuit of disgorgement without any time bar runs counter to these important policies and has led to draconian and inequitable results, as illustrated by the disgorgement award the SEC obtained against the Wylys.

A. The SEC's Use Of Unlimited Disgorgement Allowed It To Obtain A "Staggering" Award Against The Wylys Reaching Back Over Two Decades

The Wylys' case demonstrates that the SEC's pursuit of stale claims reaching back decades is not unique to petitioner's case. The SEC took the same approach in seeking recovery from the Wylys as against petitioners. Here, as in the case against petitioner, the SEC turned its own delay into an opportunity to obtain a massive "disgorgement" award unlimited by Section 2462 or any other limitations period.

The disgorgement award against the Wylys stems from an enforcement action the SEC brought in July 2010. *See SEC v. Wyly*, 950 F. Supp. 2d 547, 553 n.30 (S.D.N.Y. 2013). The civil complaint alleged that the

Wylys, their attorney, and their securities brokers violated securities laws by failing to make the requisite disclosures for securities held in overseas trusts. *Id.* at 550-53. The Wylys had set up these overseas trusts in the early 1990s after learning through a tax attorney that such a system would provide tax deferral and asset protection. *See Wyly*, 56 F. Supp. 3d at 410-13. Assets, primarily securities, would be transferred to the trusts in exchange for private annuities. The Wylys each settled the first in a series of offshore trusts in March 1992. *Id.* at 410.

In April 1992, the Wylys transferred stock options to corporate subsidiaries of the first two trusts, which issued private annuities to the Wylys in consideration for the transferred option. *Id.* 411-12, 417. For the next decade, the Wylys continued with this approach, transferring securities to the trusts, which the trusts would sell at times. *Id.* Following an IRS audit of the trusts, the SEC entered into a tolling agreement with the Wylys in 2006. *Id.* at 420-21; *Wyly*, 950 F. Supp. 2d at 553. Only then did the SEC investigate the Wylys for violating the securities laws. After four years, in 2010, the SEC filed its complaint, alleging that the Wylys were beneficial owners of the securities held in the trusts and that the Wylys had failed to make the requisite filings of amendments to their Schedule 13Ds and Form 4s when the trusts engaged in transactions. A jury found Sam Wyly and the Estate of Charles Wyly liable for certain securities disclosure violations in 2014. *See Wyly*, 56 F. Supp. 3d at 401.

In June 2013, the district court rejected the SEC's argument that the statute of limitations should be tolled so that the SEC could seek penalties beyond the

penalties falling within the five-year window permitted by Section 2462. *Wyly*, 950 F. Supp. 2d at 557-58. To avoid the force of this ruling, the SEC then sought disgorgement under a series of potential theories. The SEC cycled through numerous options, including a theory based on the idea that shareholders were "misled" as to the total number of shares the Wylys held in approving stock option plans, one based on the Wylys' alleged concealment to avoid depressing stock prices, and one based on the assumption that the Wylys had exercised their options before transferring the securities to the trusts.

Ultimately, following the jury's liability determination, the district court separately held two bench trials to determine the amount of disgorgement. *SEC v. Wyly*, 71 F. Supp. 3d 399, 403 (S.D.N.Y. 2014). Under two alternative approaches, the SEC sought a disgorgement order based on either the amount of tax payments the Wylys had avoided or trading profits they had made from the sale of registered securities. *Id.* at 403-04. The district court awarded disgorgement on each of the two "alternative" theories. *Id.*

Under the first, tax-avoidance theory, the district court ordered Sam Wyly to disgorge nearly $124 million and the Estate to disgorge more than $63 million. *Id.* at 403. The prejudgment interest alone totaled more than $104 million for the twenty-two-year period. *See* Final Judgment, *SEC v. Wyly*, No. 10 Civ. 05760 (S.D.N.Y. Feb. 26, 2015), ECF No. 591. The district court recognized that this award is "staggering and among the largest awards ever imposed against individual defendants," *Wyly*, 56 F. Supp. 3d at 433, and "equivalent to approximately 10% of the total

penalties and disgorgement ordered in SEC enforcement cases nationwide [in 2013]." *Id.* at 433 n.242.

The "alternative" disgorgement award, which would take effect only if an appellate court rejected the SEC's novel tax-avoidance method of calculating disgorgement, was based on a trading-profits theory. Under this approach, the district court ordered Sam Wyly to disgorge $83 million and the Estate to disgorge $39 million. *SEC v. Wyly*, 107 F. Supp. 3d 260, 264 (S.D.N.Y. 2015). Total prejudgment interest on these awards totaled $42 million. *Id.* In evaluating prejudgment interest for each award, the district court adopted a lower rate than what the SEC urged, but nonetheless awarded tens of millions of dollars because of the vast passage of time.

B. The SEC's Use Of Unlimited Disgorgement Undermines The Purposes Of Statutes Of Limitations

As this Court stated in *Gabelli*, "it 'would be utterly repugnant to the genius of our laws' if actions for penalties could 'be brought at any distance of time.'" *Gabelli*, 133 S. Ct. at 1223 (quoting *Adams v. Woods*, 2 Cranch 336, 342, 2 L.Ed. 297 (1805) (Marshall, C.J.)). The disgorgement award against the Wylys puts in sharp focus the SEC's use of disgorgement to avoid statutes of limitations. Such use conflicts with the purposes underlying limitations provisions like Section 2462: "repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Id.* at 1221. Applying the five-year statute of limitations to disgorgement claims will prevent the SEC from

waiting decades and then seeking outsized recoveries based on novel theories.

In *Gabelli*, in rejecting the SEC's effort to avoid Section 2462's five-year clock by means of a "discovery rule," this Court explained that the statute of limitations in Section 2462 "sets a fixed date when exposure to the specified Government enforcement efforts ends." *Id.* Section 2462, like statutes of limitations generally, is "intended to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Id.* (internal quotation marks omitted). Certainty about an individual's liability "provide[s] security and stability to human affairs," which society has "deemed . . . vital to the welfare of society, and concluded that even wrongdoers are entitled to assume that their sins may be forgotten." *Id.* (internal quotation marks and citations omitted).

This Court further explained in *Gabelli* that the SEC may not wait to bring an enforcement action and then claim it did not know of the circumstances giving rise to the action in order to seek recovery long after the statute of limitations has passed. To the contrary, the "central mission of the [SEC] is to investigat[e] potential violations of the federal securities laws." *Id.* at 1222 (internal quotation marks omitted). The SEC's core duty is to root out such violations, "and it has many legal tools at hand to aid in that pursuit." *Id.* Similarly for purposes of Section 2462, the SEC should not be allowed to assert that its own failure to investigate allows it to seek disgorgement for conduct dating back more than five years.

The SEC's conduct in the Wylys' case demonstrates why *Gabelli*'s logic should apply directly to disgorgement awards. In the Wylys' case, the SEC waited until 2010—eighteen years following the establishment of the overseas trusts at issue—to bring an enforcement action against the Wylys. The SEC neglected to investigate the relationship between the Wylys and the trusts even though public information indicated that the Wylys controlled a large percentage of the shares of the public companies at issue and that trusts associated with the Wylys had purchased shares in private placements. *Wyly*, 56 F. Supp. 3d at 421-22. Indeed, news reports during the time period characterized the shares in the trusts as among the Wylys' holdings. *Id.* Nonetheless, the SEC sought disgorgement for this entire time period, unconstrained by Section 2462.

In addition, notwithstanding the passage of eighteen years between establishment of the trusts giving rise to the violations and the SEC's filing of the complaint, the district court permitted the award of prejudgment interest for the entire twenty-two-year period. *Id.* at 433. The district court recognized that this Court "noted in *Gabelli*, that the SEC is, at least in part, responsible for the delay." *Id.* Yet, despite bearing some responsibility, the SEC still sought interest at the extraordinarily high IRS underpayment rate. *Id.* Although the district court used the LIBOR rate instead of the rate the SEC urged, the district court did not reduce that period to reflect the SEC's delay in bringing suit or the Wylys' cooperation in entering a tolling agreement. *Id.* The upshot was to reward the SEC for its delay while magnifying the punishment to the Wylys, imposing prejudgment

interest running from 1992 throughout the Wyly's tolling agreement with the SEC and totaling more than $100 million on the SEC's primary, tax-avoidance disgorgement theory.

Further, the SEC sought such inflated recovery even though it identified no victims that it sought to compensate. The SEC conceded, in fact, that disgorgement was non-compensatory. *SEC v. Wyly*, 860 F. Supp. 2d 275, 280 (S.D.N.Y. 2012) ("Admittedly, the SEC does not seek compensation."). This fact further undercuts any justification for removing disgorgement from Section 2462. This Court reasoned in *Gabelli* that a statute of limitations may be tolled "to ensure that the injured receive recompense." 133 S. Ct. at 1223. In *Gabelli*, the SEC sought penalties, not compensation for victims, and thus the discovery rule had no application. *Id.* The same is true for the SEC's use of disgorgement against the Wylys, as in petitioner's case. The SEC never alleged that the Wylys' offenses had victims apart from the IRS, which remains well equipped and positioned to vindicate its own interest in recovering any taxes owed.

In effect, the non-application of Section 2462 removes a key incentive for the SEC has to root out violations because the longer the SEC waits to pursue a claim, the larger its recovery. In the Wylys' case, the SEC is being permitted to pursue recovery dating all the way back to ***1992*** without any regard for whether or when it previously believed that the Wylys' use of the overseas trusts violated securities laws. The SEC should not be permitted to reach back so far, so unconstrainedly. Such an approach "leave[s] defendants exposed to Government enforcement action

not only for five years after their misdeeds, but for an additional uncertain period into the future." *Id.*

Moreover, the SEC's practice of bringing stale enforcement actions runs the risk that violators will be hugely penalized for conduct not known to be wrongful at the time it was undertaken. Such long delays in bringing enforcement actions subject individuals to liability based on changing interpretations of the laws. In the case of the Wylys, the SEC proposed (among other methods) a wholly unprecedented measure of disgorgement based on "the amount of federal income taxes that the Wylys allegedly avoided" by transferring stock options to the offshore trusts. *SEC v. Wyly*, No. 10 CIV. 5760 (SAS), 2013 WL 2951960, at *1 (S.D.N.Y. June 13, 2013). In adopting the SEC's novel "tax avoidance" theory, the district court concluded that the Wylys' persuasive control over the trustees of the offshore trusts meant that the Wylys should have been taxed on the sale of assets in the trusts, unless an exception applied. *See Wyly*, 56 F. Supp. 3d at 427-29. The district court's rationale for that determination required rejection of long-standing Tax Court precedent in place during the prior three decades, upending well-settled tax treatment and jeopardizing countless other carefully crafted estate plans.[2]

---

[2] The district court's opinion explicitly contradicted longstanding Tax Court precedent found in *Estate of Goodwyn v. C.I.R.*, T.C. Memo 1976-238, 1976 WL 3423 (1976). Indeed, the *Wyly* district court "opinion made several statements about the domestic grantor trust rules (without input from the IRS) that give tax and

The unsettling application of this novel "tax avoidance" theory was compounded by the district court's decision that the disgorgement award was not subject to the time bar at Section 2462. The Wylys, counseled by both tax and securities lawyers, could not have known that the tax treatment of the offshore trusts, resting as it did on well-settled Tax Court precedent, would be overturned by a district court decades after the establishment of the trusts—under the rubric of disgorgement for securities violations. And the Wylys could not have predicted that any potential liability would stretch back over a period of two decades to reach conduct that was clearly "stale." In this way, the SEC's disgorgement award against the Wylys cuts directly against the purposes served by the statute of limitations in "provid[ing] 'security and stability to human affairs.'" *Gabelli*, 133 S. Ct. at 1221 (quoting *Wood v. Carpenter*, 101 U.S. 135, 139 (1879)).

Finally, the harsh effects of the SEC's disregard for the statute of limitations is even more egregious as against the Estate because Charles Wyly died a year after the SEC filed its complaint. *Wyly*, 860 F. Supp. 2d at 275-76. Yet, the SEC continued to seek disgorgement from his Estate for conduct occurring 20 years before his death.

---

estate planning professionals pause." Advanced Estate Planning Practice Update – Summer 2016 Cases, Regulations, and Analyses, http://files.alicle.org/thumbs/datastorage/skoobesruoc/pdf/TSXB30_chapter_01_thumb.pdf.

The Wylys' case exposes the draconian results that would arise if the SEC may seek disgorgement unrestrained by the time bar of Section 2462. Faced with the SEC's extreme delay in bringing an enforcement action, the district court denied the SEC's motion for tolling the statute of limitations. Nonetheless, the district court permitted disgorgement for a two-decade period, with prejudgment interest. In fashioning the nearly $300 million disgorgement award against the Wylys, the district court allowed the SEC to avoid any consequence for its long delay in bringing suit. The SEC should not be permitted to obtain proceeds that are otherwise time-barred by labeling the remedy a "disgorgement" instead of a "forfeiture."

C. The SEC's Increasing Use Of Disgorgement Threatens To Intensify These Harms

The SEC's treatment of petitioner and the Wylys is not unique. The SEC increasingly has sought disgorgement in civil enforcement actions to avoid any limitation on its monetary recoveries for the Government. That trend has only intensified following this Court's ruling in *Gabelli*, after which the SEC extended its use of disgorgement as an alternative to penalties as the means to seek recovery for stale claims.

In recent years, the SEC has recovered growing amounts of supposed "ill-gotten gains" from defendants. From Fiscal Year 2010 to Fiscal Year 2013, total disgorgement awards increased from $1.82 billion to $2.257 billion. *See* SEC, *Year-By-Year Monetary Sanctions in SEC Enforcement Actions*, *available at* https://www.sec.gov/news/newsroom/

images/enfstats2.pdf. The disgorgement awarded was roughly double the amount of penalties over the same time period. *Id.*

In Fiscal Year 2015, the SEC obtained orders for $4.195 billion in monetary relief (up from $2.846 billion in Fiscal Year 2010), consisting of both disgorgement and penalties. *See* SEC, *FY 2017 Congressional Budget Justification, FY 2017 Annual Performance Plan, and FY 2015 Annual Performance Report* 40-41 (Feb. 9, 2016), https://www.sec.gov/about/reports/secfy17congbudgjust.pdf. The SEC, however, distributed only $158 million to investors in 2015. *Id.*

The SEC's shift from pursuing penalties—clearly subject to Section 2462—to disgorgement, raises the strong inference that the SEC has increasingly relied upon disgorgement to perform an end-run around the time limit on pecuniary penalties. This trend serves to undermine the purposes of the statute of limitations. This Court should close that loophole and confirm that disgorgement is subject to the limitation of Section 2462.

II. THE SEC'S BROAD USE OF DISGORGEMENT IS UNSUPPORTED BY THE HISTORY OF CONGRESS'S LIMITATIONS ON REMEDIES

Section 2462 provides that, "[e]xcept as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued . . . ." *Id.*

This Court should adopt petitioner's argument that, because the remedy of disgorgement falls squarely within the meaning of "forfeiture," it is subject to the five-year limitations period of Section 2462. Separately, as petitioner also correctly argues, the SEC's use of disgorgement qualifies as a "penalty" subject to the time bar in Section 2462—especially where, as in the Wylys' case, disgorgement is used to recover amounts unconnected to the need to compensate victims and far afield from the underlying offense.

A. At The Time Of Section 2462's Enactment, "Forfeiture" Was Understood As Analogous To "Disgorgement"

In the first half of the 19th century, "disgorgement" was not a widely used legal term, but "forfeiture" had a broad meaning, encompassing any situation "when a man is, by a judicial sentence, compelled to pay a sum of money to another . . . ." Jeremy Bentham, THE RATIONALE OF PUNISHMENT 252 (Robert Heward ed., 1830). This historical understanding of forfeiture encompasses modern-day disgorgement: it applied to monetary sums and was considered a remedial, rather than punitive, measure. Examination of the history of forfeiture confirms that the SEC's "disgorgement" is nothing more than forfeiture by a different name.

1. The Tenth Circuit rejected the argument that disgorgement fell under the rubric of "forfeiture" because it wrongly reasoned that forfeiture was an *in rem* procedure aimed exclusively at taking "'tangible property used in criminal activity.'" *SEC v. Kokesh*, 834 F.3d 1158, 1165 (10th Cir. 2016) (quoting *United States v. 92 Buena Vista Ave.*, 507 U.S. 111, 118

(1993)). Contrary to the Tenth Circuit's decision, early statutory forfeitures required giving up tangible property—including contraband and instrumentalities—as well as *monetary* sums. In fact, "[f]orfeiture of goods *or their value and the payment of fixed or variable sums of money* are other sanctions which have been recognized as enforceable by civil proceedings since the original revenue law of 1789." *Helvering v. Mitchell*, 303 U.S. 391, 400 (1938) (emphasis added) (citing Act of July 31, 1789, c. 5, s 36, 1 Stat. 29, 47).

In 1824, for example, this Court examined the "29th section of the collection act of 1799," which provided that the master of a ship in violation "shall forfeit and pay the sum of 400 dollars." *The Appollon*, 22 U.S. (9 Wheat.) 362 (1824). Other statutes in that period used "forfeit" in a similar fashion.[3] Likewise, a 1799 enactment "not only provide[d] for a forfeiture of the goods, but in the alternative, for a forfeiture of the value thereof, to be recovered of the person making the false entry." *Wood v. United States*, 41 U.S. 342, 365 (1842). Courts in equity also used the term "forfeit" to describe the forced giving up of monetary sums by

---

[3] *See, e.g.*, *McCulloch v. Maryland*, 17 U.S. 316, 321-22 (1819) ("forfeit a sum of $500 for each and every offence . . . to be recovered by indictment, or action of debt . . . ."); *United States v. Simms*, 5 U.S. 252, 253 (1803)) (discussing requirement to "forfeit and pay the sum of one hundred and fifty dollars"), *abrogated on other grounds by United States v. More*, 7 U.S. 159 (1805).

judicial decree. *See Diggs v. Wolcott*, 8 U.S. 179 (1807) (obtaining in "suit in chancery" both injunctive relief and forfeiture of $1,500).[4]

2. Nor is it true that forfeiture, as opposed to disgorgement, historically had been considered an exclusively punitive remedy. Early forfeitures often were viewed as serving remedial purposes like that the SEC now attributes to disgorgement. *See, e.g., United States v. Ursery*, 518 U.S. 267, 291 (1996) ("it is absolutely clear that *in rem* civil forfeiture has not historically been regarded as punishment"). In this regard, it cannot be said that "disgorgement" does not fit among the remedies listed in Section 2462.

In fact, this Court traced the use of forfeiture as a remedial measure to the early days of the republic in *United States v. Bajakajian*, 524 U.S. 321 (1998). In the context of customs violations, the Court explained that "the early monetary forfeitures [] were considered not as punishment for an offense, but rather as serving the remedial purpose of reimbursing the Government for the losses accruing from the evasion of customs

---

[4] The term "forfeiture" also has been used historically to refer to contractual clauses in deeds requiring a party to give up a certain contractual right. It is in this contractual context that courts have noted that "a Court of Chancery [was] not the proper tribunal for enforcing forfeitures." *Horsburg v. Baker*, 26 U.S. 232, 236 (1828). The Court in *Horsburg* referred to the "clause of forfeiture for alienation, which the deed contains"—not the type of forfeiture at issue in this case. *Id.* at 235.

duties." *Id.* at 342. Indeed, forfeitures were considered to be remedial in nature "at the founding," and only encompassed a punitive remedy beginning in the 1970s. *Id.* at 340-41 & n.16. The modern concept of disgorgement shares the same remedial underpinning *Bajakajian* ascribed to the historical concept of forfeiture.

3. This historical overlap between "disgorgement" and "forfeiture" is confirmed by the contemporary use of the two words as interchangeable. Modern legal dictionaries confirm that the two words have equivalent meanings. *See* BLACK'S LAW DICTIONARY (9th ed. 2009) ("forfeiture: 1. The divestiture of property without compensation.") ("disgorgement: The act of giving up something (such as profits illegally obtained) on demand or by legal compulsion."). This Court, too, has recognized that the terms "disgorgement" and "forfeiture" may be used interchangeably. *See Ursery*, 518 U.S. at 284 ("[Civil f]orfeitures serve a variety of purposes, but are designed primarily to confiscate property used in violation of the law, and to require disgorgement of the fruits of illegal conduct.").[5] As a result, the term

---

[5] Numerous courts of appeals also have used the terms interchangeably. *See, e.g., United States v. Contorinis*, 692 F.3d 136, 146 (2d Cir. 2012) ("Criminal forfeiture focuses on the disgorgement by a defendant of his 'ill-gotten gains.'"); *United States v. Venturella*, 585 F.3d 1013, 1019 (7th Cir. 2009) ("forfeiture seeks to punish a defendant for his ill-gotten gains by transferring those gains . . . to the United States Department of Justice") (citations and quotations

"forfeiture" in Section 2462 is best read to encompass "disgorgement" as a virtual synonym—the same remedy by a different name. The Eleventh Circuit has recognized this very point, holding that "for the purposes of § 2462 forfeiture and disgorgement are effectively synonyms; § 2462's statute of limitations applies to disgorgement." *SEC v. Graham*, 823 F.3d 1357, 1363 (11th Cir. 2016).

4. The absence of separate reference to the term "disgorgement" in Section 2462 is best explained by the fact that the term "disgorgement" had not gained currency at the time Congress enacted the predecessor statute in 1839. The 1839 version of the statute read: "No suit or prosecution shall be maintained, for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States, unless the same suit or prosecution shall be commenced within five years from the time when the penalty or forfeiture accrued." Act of February 28, 1839, § 4, 5 Stat. 322. Section 2462, enacted in 1948, included mere "changes in phraseology" that did not change the meaning of the statute from its predecessor. *3M Co. (Minn. Min. &*

---

omitted); *United States v. Boring*, 557 F.3d 707, 714 (6th Cir. 2009) ("Forfeiture, in contrast, is punitive; it seeks to disgorge any profits that the offender realized from his illegal activity.") (citations and quotation omitted); *United States v. Hoover–Hankerson*, 511 F.3d 164, 171 (D.C. Cir. 2007) ("Forfeiture is a means of forcing a criminal defendant to disgorge ill-gotten profits."); *United States v. Casey*, 444 F.3d 1071, 1073-74 (9th Cir. 2006) (similar).

Mfg.) v. Browner, 17 F.3d 1453, 1458 (D.C. Cir. 1994). By contrast, the first disgorgement of ill-gotten gains in the securities context did not occur until the 1970s. *See* Russell G. Ryan, *The Equity Façade of SEC Disgorgement*, 4 Harv. Bus. L. Rev. Online 10, nn.60-61 (2013); *see also SEC v. Cavanagh*, 445 F.3d 105, 118 (2d Cir. 2006) ("[A]lthough the term 'disgorgement' became common only recently, equity courts have traditionally awarded analogous forms of relief under a variety of names."). Accordingly, "forfeiture," as understood by legislators and courts in the early nineteenth century, encompasses modern-day disgorgement.

Because the term "forfeiture" has been historically understood to share the same characteristics as modern day disgorgement, it follows that disgorgement should likewise be subject to the limitations period found in Section 2462 and its predecessors.

B. Section 2462 Applies To Disgorgement Awards That Amount To A "Penalty" Within The Meaning Of 28 U.S.C. § 2462

Even if the term "forfeiture" in Section 2462 were limited to punitive measures and thus made synonymous with "penalty," the statute of limitations should apply to the SEC's use of disgorgement as a general matter and, at a minimum, in a case like petitioner's and that of the Wylys. Where the SEC's version of "disgorgement" lacks any meaningful remedial purpose or causal link to the securities violation, it is necessarily a "penalty" within the meaning of Section 2462.

As a general matter, the SEC seeks disgorgement not to compensate harmed investors but rather to deter and punish defendants, as demonstrated by petitioner's and the Wylys' cases. The district court recognized as much in the Wylys' case, noting that "disgorgement of this magnitude is more than sufficient to deter future violations." *Wyly*, 56 F. Supp. 3d at 433-34; *see also SEC v. Fischbach Corp.*, 133 F.3d 170, 175 (2d Cir. 1997) (describing deterrence as the "primary purpose of disgorgement orders"). "Deterrence, however, has traditionally been viewed as a goal of punishment." *Bajakajian*, 524 U.S. at 329. To this extent, the SEC's use of disgorgement is rightfully labeled punitive and treated as a penalty subject to Section 2462.

The SEC cannot avoid this conclusion through an argument that disgorged amounts may be viewed as compensation to harmed investors. Although the SEC may endeavor to provide these disgorged funds to victims of a defendant's fraudulent scheme, *see generally* SEC, *Investor Bulletin: How Harmed Investors May Recover Money* (2014), *available at* https://www.sec.gov/oiea/investor-alerts-bulletins/ib_recovermoney.html; SEC, *Rules of Practice and Rules on Fair Fund and Disgorgement Plans* 103-107 (2006), *available at* http://www.sec.gov/about/rulesprac2006.pdf, in fact it rarely does so, *see supra* at 15.

Treatment of such disgorgement awards as subject to the statute of limitations in Section 2462 fits this Court's reasoning in *Gabelli*. As this Court explained, "penalties, which go beyond compensation, are intended to punish." *Gabelli*, 133 S. Ct. at 1223. The

same can be said for disgorgement awards like the ones against petitioner and the Wylys, which make whole no victims and have no otherwise compensatory purpose. In fact, the SEC *conceded* in the Wylys' case that its disgorgement request was not meant to compensate victims.

Further, a punitive purpose is evident at a minimum in a case like that of the Wylys, where the disgorgement remedy lacks a causal connection to the securities violations. In securities law enforcement, it is settled that "disgorgement may not be used punitively," *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1231 (D.C. Cir. 1989), and thus the SEC must "establish[] a reasonable approximation of the profits causally related to the fraud," *SEC v. Razmilovic*, 738 F.3d 14, 31 (2d Cir. 2013). Absent the required causal connection, the disgorgement orders serve only as a "penalty" within the ambit of Section 2462.

The SEC's primary disgorgement theory in the Wylys' case, for example, allowed for a $300 million disgorgement award based on supposedly avoided taxes owed to the IRS without regard for what the IRS might determine the Wylys actually owed. This award was nearly twice the "alternative" disgorgement award, based on a trading-profits theory. And the district court permitted the SEC to pursue the trading-profits disgorgement award despite concluding that the SEC had provided "no evidence here that the defendants' unlawful conduct . . . resulted in any market distortion, price impact, or profit tied to the violation." *SEC v. Wyly*, 56 F. Supp. 3d 260, 269 (S.D.N.Y. 2014). The SEC never linked either award in any proximate way to the underlying securities

violations—as the SEC's cycling between alternative theories in and of itself illustrates. The award of such large amounts, untethered to any compensatory or remedial purpose, simply serves to punish and qualifies as a penalty under Section 2462.

The Tenth Circuit's citation to damages in tort law inadvertently confirms this point. The Tenth Circuit explained that it "do[es] not consider it punitive to require a personal-injury tortfeasor to pay for all damages caused by his tort (say, a motor-vehicle accident) even if he gained nothing thereby." *Kokesh*, 834 F.3d at 1165. But the law permits such awards because tort damages serve to compensate an injured victim, *not* to deter wrongdoers. Punitive damages awarded in tort cases, in contrast, go beyond any such causal link to compensation, and simply seek to deter wrongful conduct. A disgorgement award lacking close connection to underlying securities violations is similarly properly viewed as punitive. In the Wylys' as in petitioner's case, the award of disgorgement to the Government is not compensatory but primarily punitive, and thus properly constitutes a penalty subject to Section 2462.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

DEREK L. SHAFFER
QUINN EMANUEL
URQUHART
& SULLIVAN, LLP
777 6th Street NW
11th Floor
Washington, DC 20001
(202) 538-8000

KATHLEEN M. SULLIVAN
Counsel of Record
ELLYDE R. THOMPSON
QUINN EMANUEL URQUHART
& SULLIVAN, LLP
51 Madison Avenue
22nd Floor
New York, NY 10010
(212) 849-7000
kathleensullivan@
quinnemanuel.com

Supreme Court, U.S.
FILED
MAR 3 - 2017
OFFICE OF THE CLERK

No. 16-529

In The Supreme Court of the United States

CHARLES R. KOKESH,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF *AMICUS CURIAE* SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION IN SUPPORT OF PETITIONER

IRA D. HAMMERMAN
KEVIN M. CARROLL
SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION
1101 New York Avenue, NW
Washington, D.C. 20005
(202) 962-7300

MICHAEL J. DELL
Counsel of Record
ALAN R. FRIEDMAN
ARIELLE WARSHALL KATZ
KRAMER LEVIN NAFTALIS & FRANKEL LLP
1177 Avenue of the Americas
New York, New York 10036
(212) 715-9100
mdell@kramerlevin.com

Counsel for Amicus Curiae Securities Industry and Financial Markets Association

TABLE OF CONTENTS

Page

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 5

ARGUMENT 8

I. SECTION 2462'S FIVE-YEAR STATUTE OF LIMITATIONS APPLIES TO SEC ACTIONS FOR DISGORGEMENT 8

A. The Disgorgement Order is Punitive and a "Penalty" Under Section 2462 9

B. The Disgorgement Order is a "Forfeiture" Within the Meaning of Section 2462 14

C. The SEC Has Previously Taken the Position that Disgorgement is a "Penalty" or "Forfeiture" 20

D. The Decision Below is Inconsistent with *Gabelli* 21

II. THE TENTH CIRCUIT'S EXEMPTION OF DISGORGEMENT CLAIMS FROM SECTION 2462'S LIMITATIONS WOULD CREATE UNCERTAINTY AND INSTABILITY IN THE FINANCIAL MARKETS 23

A. The Decision Below Undermines the Enforcement of the Securities Laws by Promoting Stale Claims 23

B. The Decision Below Undermines the Principles of Repose and Certainty 28

CONCLUSION 31

TABLE OF AUTHORITIES

Page

CASES

3M Co. (Minn. Mining & Mfg.) v. Browner,
17 F.3d 1453 (D.C. Cir. 1994) 22, 24

62 Cases, More or Less, Each Containing Six Jars of Jam v. United States,
340 U.S. 593 (1951) 18

Adams v. Woods,
6 U.S. (2 Cranch) 336 (1805).....6, 22

Badaracco v. Comm'r of Internal Revenue,
464 U.S. 386 (1984) 17

Bd. of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.,
474 U.S. 361 (1986) 17

Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.,
511 U.S. 164 (1994) 24, 29

Coghlan v. NTSB,
470 F.3d 1300 (11th Cir. 2006).....9, 10, 11

Collins Sec. Corp. v. SEC,
562 F.2d 820 (D.C. Cir. 1977) 9

CTS Corp. v. Waldburger,
134 S. Ct. 2175 n(2014).....17, 29

Duncan v. Walker,
533 U.S. 167 (2001) 18

Fed. Mar. Comm'n v. Seatrain Lines, Inc.,
411 U.S. 726 (1973) 19

TABLE OF AUTHORITIES – Continued

Page

F.T.C. v. Bronson Partners, LLC,
654 F.3d 359 (2d Cir. 2011) 10

Gabelli v. SEC, 133 S. Ct. 1216 (2013) ..... *passim*

Gompers v. Buck's Stove & Range Co.,
221 U.S. 418 (1911) 10

Johnson v. SEC,
87 F.3d 484 (D.C. Cir. 1996) 9, 10, 13, 20, 27

Lamie v. United States Trustee,
540 U.S. 526 (2004) 18

Market Co. v. Hoffman,
101 U.S. 112 (1879) 18

Pinter v. Dahl,
486 U.S. 622 (1988) 29

Riordan v. SEC,
627 F.3d 1230 (D.C. Cir. 2010) 2, 12, 13

SEC v. Contorinis,
742 F.3d 296 (2d Cir. 2014) 10, 15

SEC v. First City Fin. Corp. Ltd.,
890 F.2d 1215 (D.C. Cir. 1989) 11, 14

SEC v. Fischbach Corp.,
133 F.3d 170 (2d Cir. 1997) 10

SEC v. Gann,
565 F.3d 932 (5th Cir. 2009) 13

SEC v. Graham,
21 F. Supp. 3d 1300 (S.D. Fla. 2014) 16, 19

SEC v. Graham,
823 F.3d 1357 (11th Cir. 2016) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

SEC v. JT Wallenbrock & Assocs.,
440 F.3d 1109 (9th Cir. 2006) 14

SEC v. Tambone,
550 F.3d 106 (1st Cir. 2008) 2, 12

SEC v. Telsey,
144 B.R. 563 (Bankr. S.D. Fla. 1992) 20

SEC v. Teo,
746 F.3d 90 (3d Cir. 2014) 25

SEC v. Wyly,
860 F. Supp. 2d 275 (S.D.N.Y. 2012) 10

Short v. Belleville Shoe Mfg. Co.,
908 F.2d 1385 (7th Cir. 1990) 30

Tull v. United States,
481 U.S. 412 (1987) 10, 11

United States v. Kubrick,
444 U.S. 111 (1979) 24

United States v. Nat'l Broiler Mktg. Ass'n,
550 F.2d 1380 (5th Cir. 1977) 17

United States v. Ursery,
518 U.S. 267 (1996) 15

United States v. Webber,
536 F.3d 584 (7th Cir. 2008) 15

Wilson v. Garcia,
471 U.S. 261 (1985) 28

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND REGULATIONS

28 U.S.C. § 2462 ..... *passim*

12 C.F.R. § 219.24 26

17 C.F.R. § 201.1100 12

17 C.F.R. § 201.1102(b) 12

OTHER AUTHORITIES

148 Cong. Rec. S7419 (daily ed. July 26, 2002) (Statement of Sen. Leahy) 26

Arthur B. Laby & W. Hardy Callcott, *Patterns of SEC Enforcement Under the 1990 Remedies Act: Civil Money Penalties*, 58 Alb. L. Rev. 5 (1994) 25

Black's Law Dictionary (10th ed. 2014) 11, 15

Catherine E. Maxson, Note, *SEC Enforcement Suits: The Applicability of Section 2462's Statute of Limitations to SEC Enforcement Suits in Light of the Remedies Act of 1990*, 94 Mich. 29L. Rev. 512 (1995) 29

Edward Brodsky & Scott A. Eggers, *The Statute of Limitations in SEC Civil Enforcement Actions*, 23 Sec. Reg. L.J. 123 (1995) 11

Edward Brodsky, *Statute of Limitations and Civil Enforcement: Corporate and Securities Litigation*, N.Y.L.J., Sept. 21, 1993, at 21 15

IRS Chief Counsel Mem. 201619008 (May 6, 2016) 20

TABLE OF AUTHORITIES – Continued

Page

25 Marc I. Steinberg & Ralph C. Ferrara, *Securities Practice: Federal and State Enforcement* § 4:22 (2014) 11

Robert F. Zielinski & Vito Petretti, *Records Retention: What Banks Don't Know Can and Likely Will Hurt*, 119 Banking L.J. 350 (2002) 26

Russell G. Ryan, *The Equity Facade of SEC Disgorgement*, 4 Harv. Bus. L. Rev. Online, at 5 (2013) 14

SEC, *Select SEC and Market Data Fiscal 2015* (2016) 28

SEC Div. of Enforcement, *Enforcement Manual* (2016) 26

Strengthening the SEC's Vital Enforcement Responsibilities: Hearing Before the Subcomm. On Securities, Insurance, and Investment of the S. Comm. On Banking, Housing, and Urban Affairs, 111th Cong. 46 (2009) (Statement of Robert Khuzami, Director, SEC) 27

Steven R. Glaser, *Statutes of Limitations for Equitable & Remedial Relief in SEC Enforcement Actions*, 4 Harv. Bus. L. Rev. 129 (2014) 26, 27

INTEREST OF *AMICUS CURIAE*

The Securities Industry and Financial Markets Association ("SIFMA") is an association of hundreds of securities firms, banks and asset managers, including many of the largest financial institutions in the United States. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA's members operate and have offices in all fifty states. SIFMA has offices in New York and Washington, D.C. and is the U.S. regional member of the Global Financial Markets Association. SIFMA often appears as *amicus curiae* in cases that raise legal issues of vital concern to participants in the securities industry.[1]

28 U.S.C. § 2462 (1948), the default statute of limitations for federal civil enforcement actions, sets a five-year statute of limitations for government actions to enforce "any civil fine, penalty, or forfeiture, pecuniary or otherwise":

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be

---

[1] SIFMA has submitted to the Clerk letters from all parties consenting to this filing. This brief was not authored in whole or in part by counsel for any party. No such counsel or any party made a monetary contribution to fund the preparation or submission of this brief. No person or entity other than SIFMA, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

> entertained unless commenced within five years from the date when the claim first accrued.

28 U.S.C. § 2462.

In *Gabelli v. SEC*, 133 S. Ct. 1216 (2013), this Court unanimously held that the five-year limitations period in Section 2462 applies to Securities and Exchange Commission ("SEC") claims for civil money penalties. The Court rejected the SEC's request to add a "discovery rule" that would have exposed defendants to government enforcement actions "not only for five years after their misdeeds, but for an additional uncertain period into the future." *Id.* at 1223. The Court recognized that statutes of limitations play a vital role in cases where the government seeks to punish alleged wrongdoers by (1) providing repose to potential defendants; (2) protecting defendants from the prejudice caused by stale claims and unreliable evidence; and (3) creating certainty about a defendant's potential liabilities. *Id.* at 1221.

Following *Gabelli*, the Eleventh Circuit held that Section 2462's five-year limitations period applies to SEC claims for disgorgement, because disgorgement is a "forfeiture" within the plain meaning of the statute. *SEC v. Graham*, 823 F.3d 1357, 1363 (11th Cir. 2016). However, the Tenth Circuit, in the ruling below, joined the pre-*Gabelli* opinions of the First and D.C. Circuits that Section 2462 does not apply to the SEC's disgorgement claims. Pet. App. 2a; *SEC v. Tambone*, 550 F.3d 106, 148 (1st Cir. 2008); *Riordan v. SEC*, 627 F.3d 1230,

1234 (D.C. Cir. 2010). The Tenth Circuit reasoned that disgorgement is traditionally treated as an "equitable" remedy that it is "remedial" and not a "penalty" under Section 2462, and that Section 2462's reference to forfeiture should be read narrowly to refer to *in rem* proceedings and not to SEC disgorgement claims. That ruling is inconsistent with *Gabelli* and the plain language of Section 2462 and overlooks the bedrock principles underlying that statute.

SIFMA's members have a strong interest in the Court's application of Section 2462's five-year limitations period to any SEC claims that are functionally fines, penalties or forfeitures – including disgorgement claims – because SIFMA's members are regulated under the securities laws and require certainty and predictability. SIFMA and its members believe the text of Section 2462 and the Court's rationale for its ruling in *Gabelli* compel the application of the five-year limitations period to SEC disgorgement claims for the following reasons:

First, disgorgement, however labeled, is a punitive remedy that falls within the statute's express reference to a "penalty" or "forfeiture." Disgorgement orders are monetary judgments payable to the government to punish a wrongdoer, not compensatory remedies. Their primary function is ensuring that a wrongdoer does not profit and deterring violations of the securities laws. Indeed, the SEC has argued that disgorgement obligations should be treated as non-dischargeable debts precisely because they are punitive and constitute a "penalty" or "forfeiture" within the meaning of

the Bankruptcy Code. The SEC should not take a contrary position here. Doing so would undermine Section 2462 and the effective enforcement of the law. The Tenth Circuit's decision violates the long-settled principle that words in statutes should be given their ordinary meaning. It would allow the SEC to shield actions for a disgorgement penalty or forfeiture from Section 2462's five-year limitations period merely by characterizing the sanction as "equitable." SIFMA and its members recognize the importance of applying laws as they are written by Congress, not based on subjective assertions of legislative purpose that do not take account of the objectives Congress weighed in drafting particular provisions. That is essential to ensure predictability. And predictability is crucial for the effective and efficient functioning of the markets because it allows participants to understand how to comply with the law and how it will be enforced. This Court should restore the focus to Section 2462's text and correct the Tenth Circuit's interpretation that strays from its plain language and structure. A failure to do so would risk encouraging courts around the country to depart from text in a misguided effort to divine intent and policy.

Second, the Tenth Circuit's ruling is inconsistent with *Gabelli*. This Court recognized in *Gabelli* that settled principles of certainty, repose and elimination of stale claims require the application of Section 2462's five-year limitations period as a check on the government's power to punish through civil enforcement penalties. Creating a government "exception" to

Section 2462 for disgorgement would undermine that ruling.

Finally, the Tenth Circuit's ruling, by permitting the government to seek disgorgement in perpetuity, would create uncertainty and instability in the financial markets. SIFMA's members rely on the fair, consistent and timely enforcement of the securities laws to deter and remedy wrongdoing. One key component is the consistent application of statutes of limitations that are a critical part of those laws. By establishing a definitive outside time limit for exposure to government enforcement efforts, Section 2462 provides the markets with a measure of certainty and finality, sets a time after which participants are free from lingering liabilities and stale claims, and ensures that claims can be adjudicated based on evidence that is fresh. SIFMA's members and their investors and customers depend upon such finality in their financial planning and operations. The decision below would undermine the important values and goals that Section 2462 serves and should be reversed.

SUMMARY OF ARGUMENT

This appeal presents the fundamental question whether the dispositive principles of law this Court articulated in *Gabelli* should be *sub silentio* limited, and Section 2462's five-year period for the government to bring an action for a "penalty" or "forfeiture" should be judicially bypassed when the SEC characterizes its

"disgorgement" claim as "equitable." SIFMA supports Petitioner's argument that SEC enforcement actions seeking disgorgement are governed by Section 2462's five-year limitations period regardless of the manner in which the SEC characterizes them. The disgorgement sought by the SEC in this case – grounded on conduct dating back to 1995, fourteen years before the SEC filed suit in 2009 – is both a "penalty" and a "forfeiture" within the plain meaning of Section 2462.[2]

The ruling below would allow the government to avoid Section 2462's five-year limitations period merely by labeling the disgorgement it seeks as "equitable." That distinction is not tenable. This Court's decision in *Gabelli* made clear that the core principles underlying Section 2462 (and all statutes of limitations) – certainty, repose and elimination of stale claims – must be applied to government penalty or forfeiture actions. There is nothing about disgorgement claims that makes them less subject to Section 2462 than any other "civil fine, penalty, or forfeiture, pecuniary or otherwise." As Chief Justice Marshall observed centuries ago, "[i]n a country where not even treason can be prosecuted after a lapse of three years, it could scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture." *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 342 (1805).

---

[2] SIFMA does not take a position on the merits of the SEC's allegations against Petitioner.

SIFMA's members recognize that the appropriate exercise by the SEC of the investigative and enforcement powers granted to it by Congress plays an important role in the regulation of the nation's financial markets. However, Congress has also concluded that the pursuit of old and stale claims poses a particularly acute threat of government overreaching. Accordingly, Congress has established statutes of limitations and repose for actions involving alleged violations of the federal securities laws. Section 2462's five-year statute of limitations gives the SEC abundant time to discover and investigate violations of the securities laws and bring actions for disgorgement.

Belated enforcement efforts after Section 2462's five-year limitations period has run would have significant adverse consequences for businesses and investors, as well as all market participants. By expanding the government's ability to impose punitive disgorgement sanctions years and decades after alleged misconduct, the decision below would create uncertainty, unpredictability and an indefinite threat of exposure to government enforcement actions and thereby undercut the very purpose of statutes of limitations. This Court should apply Section 2462 in accordance with its text and reverse the decision below.

ARGUMENT

I. SECTION 2462'S FIVE-YEAR STATUTE OF LIMITATIONS APPLIES TO SEC ACTIONS FOR DISGORGEMENT

Section 2462 imposes a default five-year limitations period whenever the government seeks to enforce "any civil fine, penalty, or forfeiture, pecuniary or otherwise." 28 U.S.C. § 2462. The Tenth Circuit's ruling is inconsistent with the plain meaning of that statute. It would allow the government, merely by labeling disgorgement an "equitable" sanction, to sidestep the limitations period in Section 2462 and seek disgorgement for conduct that occurred more than five years earlier – in this case, disgorgement of approximately $35 million, plus an additional $18 million in prejudgment interest, for conduct as long ago as fourteen years before the SEC filed suit.[3] But it is the effect of the sanction, not the label-of-convenience attached to it by a government enforcer, that determines whether Section 2462's limitations period applies. Section 2462 applies to

---

[3] On October 27, 2009, the SEC filed a civil enforcement action against Petitioner seeking, *inter alia*, disgorgement in connection with alleged securities law violations between 1995 through 2007. Pet. App. 2a, 21a. There is no dispute that if Section 2462's limitations period applied, the SEC could not seek relief for the period prior to October 27, 2004 (five years before the SEC filed its complaint). *Id.* at 26a. In November 2014, following a five-day jury trial, the district court ordered Petitioner to disgorge $34.9 million, of which the SEC conceded only approximately $5 million was the result of conduct that occurred on or after October 27, 2004. *Id.* at 21a, 45a. The district court ordered Petitioner to pay an additional $18 million in prejudgment interest on the disgorgement. *Id.* at 45a.

the disgorgement ruling the SEC obtained against Petitioner below because it is both a "penalty" and a "forfeiture" within the meaning of the statute.

A. The Disgorgement Order is Punitive and a "Penalty" Under Section 2462

A "penalty" under Section 2462 is "a form of punishment imposed by the government for unlawful or proscribed conduct, which *goes beyond remedying the damage caused to the harmed parties* by the defendant's action." *Coghlan v. NTSB*, 470 F.3d 1300, 1305 (11th Cir. 2006) (per curiam) (quoting *Johnson v. SEC*, 87 F.3d 484, 488 (D.C. Cir. 1996)) (emphasis added). As this Court has explained, a penalty is "something imposed in a punitive way for an infraction of a public law." *Gabelli*, 133 S. Ct. at 1223 (quoting *Meeker v. Lehigh Valley R. Co.*, 236 U.S. 412, 423 (1915)).

Because the disgorgement order below was "imposed in a punitive way" at the request of the SEC "for an infraction of a public law," it is a "penalty" within the meaning of Section 2462. However, the Tenth Circuit ruled to the contrary, after determining that disgorgement has traditionally been treated as an "equitable" remedy. Pet. App. 10a-11a. Courts have cautioned, however, that "[s]uch labels are likely to reflect conclusions rather than analyses, and in any event are not determinative." *Collins Sec. Corp. v. SEC*, 562 F.2d 820, 825 (D.C. Cir. 1977), *abrogated by Steadman v. SEC*, 450 U.S. 91 (1981). The applicability of Section 2462 depends on the *purpose* and *effect* of

disgorgement. *See Johnson*, 87 F.3d at 491 (determining Section 2462's scope based on "the effect of the SEC's action"); *Coghlan*, 470 F.3d at 1305; *Johnson*, 87 F.3d at 491; *see also Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 441 (1911) ("It is not the fact of punishment, but rather its character and purpose that often serve to distinguish between" remedial and punitive relief).

Disgorgement is punitive under Section 2462 particularly where, as here, a defendant is required to disgorge *more* than he actually personally profited. Pet. App. 45a; *see, e.g.*, *SEC v. Contorinis*, 743 F.3d 296, 309 (2d Cir. 2014) (Chin, J., dissenting) (disgorgement is punitive when "profits were not [defendant's]" and "were never in his possession or control" because "they were earned by the fund by which he was employed"); *SEC v. Wyly*, 860 F. Supp. 2d 275, 277 (S.D.N.Y. 2012) ("awards that exceed the defendant's gains are punitive and beyond the court's equitable powers"); *see also Tull v. United States*, 481 U.S. 412, 423-24 (1987) (disgorgement is "a more limited form of penalty than a civil fine"; court "impose[d] punishment" by ordering disgorgement that exceeded profits).

Such disgorgement is designed both to punish a wrongdoer and "to deter" future violations, which is the touchstone of a punitive remedy. *See, e.g.*, *SEC v. Fischbach Corp.*, 133 F.3d 170, 175 (2d Cir. 1997); *see also F.T.C. v. Bronson Partners, LLC*, 654 F.3d 359, 373 (2d Cir. 2011) ("[W]hen a public entity seeks disgorgement it does not claim any entitlement to particular property; it seeks only to deter violations of the laws

by depriving violators of their ill-gotten gains.") (internal quotation marks and alterations omitted); *SEC v. First City Fin. Corp. Ltd.*, 890 F.2d 1215, 1232 n.24 (D.C. Cir. 1989) ("in the context of an SEC enforcement suit, [] deterrence is the key objective"); Edward Brodsky & Scott A. Eggers, *The Statute of Limitations in SEC Civil Enforcement Actions*, 23 Sec. Reg. L.J. 123, 135-36 (1995) ("[D]isgorgement serves a primary function of deterring violations of the securities laws, not compensation."). Although the SEC attempts to characterize disgorgement as an "equitable" remedy, "the language of 'deterrence' is not the language of equity." *Id.* at 136.

Disgorgement is also punitive because, as is true of penalties, the SEC's primary purpose is not to compensate victims. Relief that "goes beyond remedying the damage caused to the harmed parties" is punitive. *Coghlan*, 470 F.3d at 1305 (internal quotation marks omitted); *see also Penalty*, *Black's Law Dictionary* (10th ed. 2014) (a "penalty" is "[p]unishment imposed on a wrongdoer . . . as distinguished from compensation for the injured party's loss"); 25 Marc I. Steinberg & Ralph C. Ferrara, *Securities Practice: Federal and State Enforcement* § 4:22 (2016) (collecting authorities and concluding that "the primary purpose of disgorgement is punitive: to punish based on violations of the securities laws rather than to compensate the victims"). The SEC's disgorgement orders "go beyond compensation, are intended to punish, and label defendants wrongdoers." *See Gabelli*, 133 S. Ct. at 1223; *see also Tull*, 481 U.S. at 422 (penalties are "intended

to punish culpable individuals," not "to extract compensation or restore the status quo"). The SEC's own rules expressly permit disgorged funds to go to the United States Treasury instead of to victims. Although the SEC may compensate victims through a Fair Fund, such funds are permitted only when the SEC obtains civil money penalties which are subject to Section 2462's five-year statute of limitations. *See* SEC Rules of Practice: Fair Fund and Disgorgement Plans, 17 C.F.R. §§ 201.1100, 201.1102(b).

The Tenth Circuit reasoned, however, that despite these quintessentially punitive characteristics, disgorgement is not a "penalty" under Section 2462 because it is "remedial" and "does not inflict punishment." Pet. App. 10a-11a. According to the Tenth Circuit, disgorgement is non-punitive because it "just leaves the wrongdoer in the position he would have occupied had there been no misconduct." *Id.* at 11a (internal citation and internal quotation marks omitted). The court below cited the D.C. and First Circuits' decisions that disgorgement was not a "penalty" under Section 2462. *Id.* at 10a-11a; *Riordan v. SEC*, 627 F.3d 1230, 1234 (D.C. Cir. 2010) ("disgorgement is not a civil penalty" and "not subject to the five-year statute of limitations") (internal quotation marks omitted); *SEC v. Tambone*, 550 F.3d 106, 148 (1st Cir. 2008) (Section 2462 "applies only to penalties sought by the SEC, not its request for . . . disgorgement"). But the D.C. and First Circuits made those rulings before this Court's decision in *Gabelli* and they cannot be reconciled with its teaching that orders that "go beyond compensation,

are intended to punish, and label defendants wrongdoers" are "penalties" under Section 2462.[4] 133 S. Ct. at 1223. Moreover, the Tenth Circuit overlooked all of the punitive characteristics of disgorgement. *See also Johnson*, 87 F.3d at 491 n.11 ("It is clearly possible for a sanction to be 'remedial' in the sense that its purpose is to protect the public, yet not be 'remedial' because it imposes a punishment going beyond the harm inflicted by the defendant.").

Further, although an SEC enforcement action for disgorgement is sometimes labeled as "equitable" or "remedial," in practice district courts apply very little discretion in awarding disgorgement. Once a defendant is found liable, disgorgement follows almost automatically without regard for the damages suffered by a wronged party. Unlike SEC requests for injunctive relief, for which district courts perform a multi-factor analysis to determine whether the SEC has established a reasonable likelihood of future violations, *see, e.g.*, *SEC v. Gann*, 565 F.3d 932, 940 (5th Cir. 2009) ("[i]n imposing a permanent injunction, the district court must consider a number of factors"), the SEC's burden when it seeks disgorgement is simply to show

---

[4] *Riordan* is also distinguishable because the disgorgement award there could be viewed as compensatory. In *Riordan*, the defendant broker allegedly engaged in a scheme to defraud the citizens of the State of New Mexico by paying kickbacks to the state treasurer in exchange for obtaining securities transactions from the New Mexico State Treasurer's Office. 627 F.3d at 1231. The D.C. Circuit explained that "the disgorged moneys will apparently be returned to the New Mexico State Government and not retained by the U.S. Government." *Id.* at 1234, n.1.

that the amount to be disgorged "reasonably approximates" the defendant's illicit profits; the burden then shifts to the defendant to rebut the presumption that the profits are illegal, a "near-impossible" task. *SEC v. First City Fin. Corp. Ltd.*, 890 F.2d at 1231-32 ("separating legal from illegal profits exactly may at times be a near-impossible task"). Similarly, a defendant is often required to "disgorge" without receiving any credit for expenses. Pet. App. 12a; *see also SEC v. JT Wallenbrock & Assocs.*, 440 F.3d 1109, 1114-15 (9th Cir. 2006) (defendant was not entitled to deduct business and operating expenses from the amount of his disgorgement because "it would be unjust to permit the defendants to offset" such amounts); Russell G. Ryan, *The Equity Facade of SEC Disgorgement*, 4 Harv. Bus. L. Rev. Online 1, 5 (2013), http://www.hblr.org/?p=3528 (disgorgement's "resemblance to a truly equitable remedy largely disappears" and the punitive attributes of disgorgement "call into question whether the label of equity accurately describes disgorgement"). Accordingly, when the SEC seeks disgorgement, it seeks a "penalty" and Section 2462 applies.

B. The Disgorgement Order is a "Forfeiture" Within the Meaning of Section 2462

There is also no meaningful difference between disgorgement and forfeiture. As the Eleventh Circuit correctly concluded, "under the plain meaning" of Section 2462, "forfeiture and disgorgement are effectively synonyms." *Graham*, 823 F.3d at 1363-64 ("disgorgement is imposed as redress for wrongdoing and can be

considered a subset of forfeiture"); *see also* Edward Brodsky, *Statute of Limitations and Civil Enforcement: Corporate and Securities Litigation*, N.Y.L.J., Sept. 21, 1993, at 21 ("An SEC civil enforcement action seeking disgorgement of illegally-obtained profits is in the nature of a forfeiture action."). "Disgorgement" is the "act of giving up something (such as profits illegally obtained) on demand or by legal compulsion." *Disgorgement*, *Black's Law Dictionary* (10th ed. 2014). Similarly, a "forfeiture" is the "loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty." *Forfeiture*, *Black's Law Dictionary* (10th ed. 2014). The Tenth Circuit acknowledges this much. Pet. App. 13a (forfeiture and disgorgement "capture similar concepts").

Courts have long used the terms "disgorgement" and "forfeiture" interchangeably to describe orders that require a defendant to give up ill-gotten profits. *See United States v. Ursery*, 518 U.S. 267, 284 (1996) (forfeiture is "designed primarily to confiscate property used in violation of the law, and to require *disgorgement of the fruits of illegal conduct*") (emphasis added); *United States v. Webber*, 536 F.3d 584, 602-03 (7th Cir. 2008) ("Forfeiture, in contrast [to restitution], is punitive; it seeks to *disgorge any profits* that the offender realized from his illegal activity") (emphasis added); *see also Contorinis*, 742 F.3d at 310 (Chin, J., dissenting) (the terms are "largely the same. . . . [b]oth forfeiture and disgorgement seek to force a defendant to give up – that is, to forfeit or to disgorge – what he has wrongfully gained;" collecting cases using the terms

synonymously). As the district court concluded in *Graham*, "the disgorgement of all ill-gotten gains realized from the alleged violations of the securities laws – *i.e.*, requiring defendants to relinquish money and property – can truly be regarded as nothing other than a forfeiture (both pecuniary and otherwise), which remedy is expressly covered by § 2462." *SEC v. Graham*, 21 F. Supp. 3d 1300, 1310-11 (S.D. Fla. 2014), *aff'd in part and rev'd in part*, 823 F.3d 1357 (11th Cir. 2016).

There can be no question that the disgorgement order here, which requires Petitioner to give up all ill-gotten gains, is a forfeiture. However, despite acknowledging the overwhelming similarities between disgorgement and forfeiture, the court below adopted a "narrow" reading of Section 2462 to define forfeiture in a "historical sense." According to the Tenth Circuit, "forfeiture" as used in Section 2462 refers to *in rem* proceedings – dating back to the "early days of the Republic" – to take "tangible property used in criminal activity." Pet. App. 14a. In substituting its own view of the purpose of Section 2462 for the text of the statute, the Tenth Circuit pointed to historical examples of forfeiture such as "the seizure of ships engaged in piracy" and illegal "distilleries," and reasoned that disgorgement "does not fit in that company." *Id.* at 14a. However, these efforts to artificially distinguish "disgorgement" from "forfeiture" flout Congressional intent as expressed in the plain language of Section 2462.

The Tenth Circuit's decision violates the long-settled principle that words in statutes "should be given

their ordinary, popular meaning unless Congress clearly meant the words in some more technical sense." *United States v. Nat'l Broiler Mktg. Ass'n*, 550 F.2d 1380, 1386 (5th Cir. 1977), *aff'd*, 436 U.S. 816 (1978); *see Graham*, 823 F.3d at 1364 ("We find no indication that in enacting § 2462's widely applicable statute of limitations, Congress meant to adopt the technical definitions of forfeiture and disgorgement the SEC urges over the words' ordinary meanings."). A dominant theme of this Court's jurisprudence is that legislation must be enforced in accordance with its plain language, and not based on a judicial assessment of how best to effectuate a perceived legislative purpose. When Congress crafts legislation and statutes of limitations, it inevitably balances competing policy goals. *See, e.g.*, *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2185 (2014) ("[A]lmost every statute might be described as remedial in the sense that all statutes are designed to remedy some problem," but "'no legislation pursues its purposes at all costs.'" (quoting *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam))); *see also Bd. of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986) ("[T]he final language of the legislation may reflect hard-fought compromises. Invocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent."). This Court has repeatedly reminded courts not to "rewrite a statute because they might deem its effects susceptible of improvement" to carry out perceived legislative purposes. *Badaracco v.*

Comm'r of Internal Revenue, 464 U.S. 386, 398 (1984). Untethering statutory construction from the plain language of the statute, and relying instead on subjective judicial speculation about how best to accomplish Congressional policy, would infringe on the role of our elected legislators. *See Lamie v. United States Trustee*, 540 U.S. 526, 538 (2004).

Moreover, by limiting the definition of forfeiture in the statute to *in rem* proceedings, the Tenth Circuit effectively erased the words "pecuniary or otherwise" from Section 2462. While *in rem* proceedings are by definition actions against "tangible property," Pet. App. 14a, "pecuniary" actions are monetary. If Congress had intended forfeiture to apply *only* to non-pecuniary *in rem* actions, it would not have included the phrase "pecuniary or otherwise" immediately following the words "any civil fine, penalty, or forfeiture" in Section 2462. The Tenth Circuit erred by impermissibly treating the words "pecuniary or otherwise" in the statute as superfluous. *See, e.g.*, *Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute. . . . We are thus reluctant to treat statutory terms as surplusage in any setting.") (internal citation and quotation marks omitted); *Market Co. v. Hoffman*, 101 U.S. 112, 115-16 (1879) ("As early as in Bacon's Abridgment, sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'"); *see also 62 Cases, More or Less, Each Containing Six Jars of Jam v. United States*, 340 U.S. 593, 596 (1951)

(explaining that courts must look to "what Congress has written. . . . neither to add nor to subtract, neither to delete nor to distort"). As the Eleventh Circuit explained in rejecting the SEC's artificial attempt to distinguish forfeiture and disgorgement by focusing on *technical* definitions, rather than the words' *ordinary* meanings: "Had Congress wished unique or specialized meanings to attach to any of these terms, it readily could have taken the obvious and usual step either of including a specialized meaning in the definitions section of the statute or by using clear modifying language in the text of the statute." *Graham*, 823 F.3d at 1364 (internal citation and question marks omitted).

Furthermore, as this Court has explained, "catchall" provisions like Section 2462 "are to be read as bringing within a statute categories similar in type to those specifically enumerated." *Fed. Mar. Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 734 (1973). The Tenth Circuit's narrow (and arcane) reading of Section 2462 makes little sense because the statute "applies to a wide variety of agency actions and contexts." *Graham*, 823 F.3d at 1364. Whether forfeiture and disgorgement are synonymous, or disgorgement is a subset of forfeiture, the *effect* on a defendant is the same. Thus, the most natural reading of Section 2462 is that disgorgement is a "forfeiture." *See Gabelli* at 1220. "To hold otherwise would be to open the door to Government plaintiffs' ingenuity in creating new terms for the precise forms of relief expressly covered by the statute in order to avoid its application." *Graham*, 21 F. Supp. 3d at 1311.

C. The SEC Has Previously Taken the Position that Disgorgement is a "Penalty" or "Forfeiture"

It is incongruous for the SEC to deny that disgorgement is a "civil fine, penalty or forfeiture" under Section 2462 when it has asserted that disgorgement is a "penalty" or "forfeiture" in other contexts. In *SEC v. Telsey*, the SEC argued that a disgorgement order is a "fine, penalty or forfeiture" within the meaning of the Bankruptcy Code and not a debt subject to discharge. 144 B.R. 563, 564-65 (Bankr. S.D. Fla. 1992) ("The S.E.C. contends that its debt arising from the District Court [disgorgement] order is excepted from discharge . . . to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss."). The *Telsey* court was persuaded that "the deterrence purpose of the disgorgement order [is] sufficiently penal to characterize it as a 'fine, penalty, or forfeiture,'" and therefore not dischargeable in bankruptcy. *Id.* at 565; *see also Johnson*, 87 F.3d at 484 n.10 ("The SEC's own position on what constitutes a penalty appears to vary with the context. . . . The SEC never explains why the position it took in [*Telsey*] should not apply here as well.").[5]

---

[5] The IRS has taken a similar position that a disgorgement payment by an entity-taxpayer to the SEC for alleged FCPA violations is "primarily punitive" and is therefore a "fine or similar penalty paid to a government for the violation of any law" that is nondeductible under Section 162(f) of the Tax Code. *See* IRS Chief Counsel Mem. 201619008, at 8, 10 (May 6, 2016) (disgorgement in

D. The Decision Below is Inconsistent with *Gabelli*

The ruling below should also be reversed because it conflicts with the principles set out by the Court in *Gabelli*. In *Gabelli*, this Court unanimously held that Section 2462 bars the SEC from seeking civil monetary penalties for violations that occurred more than five years before the SEC brought an enforcement action. 133 S. Ct. 1216, 1220 (2013). The Court explained that Section 2462 sets a fixed date when exposure to government enforcement efforts ends, and thereby advances the basic purpose of limitations periods: "repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Id.* at 1221 (citing *Rotella v. Wood*, 528 U.S. 549, 555 (2000)). *Gabelli* explicitly rejected the SEC's position that a "discovery rule" should apply to Section 2462. As the Court made clear, the SEC's approach would have eroded the core principles of all statute of limitations provisions. *Gabelli* at 1221.

While the applicability of Section 2462 to SEC claims for disgorgement was "not before" the Court in *Gabelli*, nothing in the Court's opinion suggests that its rationale is limited to civil money penalties. And nothing in the opinion suggests that the "vital" concerns expressed by the Court about repose, stale

---

federal securities law cases may be primarily punitive or primarily compensatory for federal tax law purposes depending on the facts and circumstances of a particular case. When disgorgement does not compensate victims, it should be treated as a non-deductible penalty).

evidence, and uncertainty would be somehow remediated simply because the SEC styles its disgorgement claim as "equitable" rather than punitive. "Given the reasons why we have statutes of limitations, there is no discernable rationale for applying § 2462 when" the SEC seeks a monetary penalty "but not when" it seeks disgorgement. *3M Co. (Minn. Mining & Mfg.) v. Browner*, 17 F.3d 1453, 1457 (D.C. Cir. 1994). "The concern that after the passage of time 'evidence has been lost, memories have faded, and witnesses have disappeared' pertains equally to" civil money penalties and disgorgement. *Id.* (quoting *Order of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 349 (1944)). The Tenth Circuit's holding would leave defendants exposed to government disgorgement claims "not only for five years after their misdeeds, but for an additional uncertain period into the future." *Gabelli*, 133 S. Ct. at 1223; *see supra* at 1-2. As Chief Justice Marshall observed, such a result would be "utterly repugnant to the genius of our laws." *Gabelli*, 133 S. Ct. at 1223 (quoting *Adams*, 6 U.S. (2 Cranch) at 342).

The logical ramification of *Gabelli* is that the SEC may not impose punitive sanctions like disgorgement if those sanctions are based on claims that accrued more than five years before the SEC initiated an enforcement action. The Court should make clear that it meant what it said in *Gabelli* and that the central purpose of Section 2462 should not be undermined by creating an indefinite threat of government enforcement actions.

II. THE TENTH CIRCUIT'S EXEMPTION OF DISGORGEMENT CLAIMS FROM SECTION 2462'S LIMITATIONS WOULD CREATE UNCERTAINTY AND INSTABILITY IN THE FINANCIAL MARKETS

Applying Section 2462 to all SEC enforcement actions makes sense and advances the important policy reasons for statutes of limitations that this Court articulated in *Gabelli*. The bright line Congress drew when it enacted Section 2462's five-year limitations period serves a vital role in the administration of justice and provides markets with stability and certainty. Requiring the SEC to bring disgorgement claims within five years of an alleged violation promotes effective deterrence, protects against the specter of stale claims, and provides fairness and efficiency in the securities markets. The Tenth Circuit's ruling would undermine these important objectives by permitting the government to bring civil disgorgement claims in perpetuity.

A. The Decision Below Undermines the Enforcement of the Securities Laws by Promoting Stale Claims

The Tenth Circuit's exemption of claims for disgorgement penalties and forfeitures from the limitations of Section 2462 has the potential to degrade the efficient enforcement of the securities laws. This Court explained in *Gabelli* that statutes of limitations provide "security and stability to human affairs" and are "vital to the welfare of society." 133 S. Ct. at 1221

(internal quotation marks and citations omitted). As this Court has long recognized, "it does not follow that" extending the reach of civil remedies in the securities laws "better serve[s]" "the objectives of the statute." *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188 (1994) ("mak[ing] the civil remedy more far reaching. . . . may disserve the goals of fair dealing and efficiency in the securities markets").

Section 2462's limitations period protects market participants from the problems of proof that would arise if long-delayed litigation were permissible. Disgorgement claims based on conduct that occurred more than five years before the claims were brought undermines the goals of fairness and efficiency in the securities markets. Cases brought years or decades after the fact become shrouded in faded memories and lost evidence. As this Court has cautioned, when claims are "allowed to slumber" for that long, often "evidence has been lost, memories have faded, and witnesses have disappeared." *Gabelli*, 133 S. Ct. at 1221 (quoting *R.R. Telegraphers*, 321 U.S. at 348-49). Limitations periods thus "promote justice by preventing surprises through the revival of [such] claims." *Id.*; *see also United States v. Kubrick*, 444 U.S. 111, 117 (1979) ("'[T]he right to be free of stale claims in time comes to prevail over the right to prosecute them.'" (quoting *R.R. Telegraphers*, 321 U.S. at 349); *3M Co.*, 17 F.3d at 1457 ("Statutes of limitations also reflect the judgment that there comes a time when the potential defendant 'ought to be secure in his reasonable expectation that the slate has

been wiped clean of ancient obligations.'") (internal citation omitted); Arthur B. Laby & W. Hardy Callcott, *Patterns of SEC Enforcement Under the 1990 Remedies Act: Civil Money Penalties*, 58 Alb. L. Rev. 5, 52 (1994) ("As the SEC . . . bring[s] cases that are increasingly distant from the time of the alleged violations, faded memories and the disappearance of evidence may make it harder for the SEC to prove violations (and harder for some innocent defendants to demonstrate their blamelessness)"). These concerns ring especially true in the securities industry, which experiences high employee turnover and cyclical downsizing. When the SEC pursues an enforcement action more than five years after an event has occurred, the relevant employees are less likely than in other industries to be performing the same job for the same employer, which makes investigations and trials more costly and less reliable.

Section 2462's five-year limitations period is therefore essential to the functioning of affirmative defenses under the securities laws, which could otherwise be undermined by the passage of time. This is particularly true of disgorgement claims, where the SEC is required to proffer only a "reasonable approximation" of profits to create a "presumption of illegal profits." *SEC v. Teo*, 746 F.3d 90, 105 (3d Cir. 2014). Evidentiary problems associated with stale claims are particularly acute for defendants in rebutting this presumption. The ability to rebut disgorgement claims with viable evidence deteriorates with the passage of time. By subjecting defendants to the indefinite threat

of stale claims, the Tenth Circuit's ruling would deprive market participants the opportunity to gather exculpatory evidence and mount a defense while facts are still fresh.[6]

Setting a fixed date when exposure to government enforcement efforts ends no matter what relief is requested has the further salutary effect of encouraging the SEC to focus on its central "mission" to "protect investors and the markets by investigating potential violations of the federal securities laws and litigating the SEC's enforcement actions." SEC Div. of Enforcement, *Enforcement Manual* at 1 (2016). As the SEC has acknowledged, "[s]wift investigations generally are most effective and enhance the public interest." *Id.* at 32. "The public does not benefit from a framework in which the SEC can wait as long as it pleases to impose significant sanctions." Steven R. Glaser, *Statutes of Limitations for Equitable and Remedial Relief in SEC*

---

[6] The risk of stale and lost evidence for claims based on conduct that occurred more than five years ago is further compounded by the fact that records retention policies for financial services firms often correlate to the time periods in relevant statutes and regulations, which – like Section 2462 – generally do not exceed five years. *See, e.g.*, 12 C.F.R. § 219.24 (records retention period for domestic and international funds transfers and transmittals of funds is five years); Robert F. Zielinski & Vito Petretti, *Records Retention: What Banks Don't Know Can and Likely Will Hurt*, 119 Banking L.J. 350, 351-52 (2002); 148 Cong. Rec. S7419 (daily ed. July 26, 2002) (Statement of Sen. Leahy) ("[I]t is intended that the SEC promulgate rules and regulations that require the retention of such substantive material . . . for such a period as is reasonable and necessary for effective enforcement of the securities laws . . . most of which have a five-year statute of limitations.").

Enforcement Actions, 4 Harv. Bus. L. Rev. 129, 155 (2014). It is reasonable to "expect the SEC to focus its efforts on bringing claims in a timely fashion" to protect market participants from being confronted with old and stale claims brought by the SEC decades after the alleged misconduct. *Id.* A rule that allows the government to sleep on its rights for years or decades and then bring a disgorgement claim when a defendant's potential defenses have all but disappeared promotes the wrong kind of incentives and defangs an important check on government enforcement.

The passage of time also diminishes the deterrent effect of disgorgement. *See Johnson*, 87 F.3d at 492 n.14 ("[T]he SEC argues that enforcing § 2462 would 'hobble efforts to prevent future harm to the public.' It is equally likely, however, that once the SEC has delayed more than five years in proceeding against a [defendant] it considers a grave threat to the public, the bulk of the harm has already been done." (internal citation omitted)); *see also Strengthening the SEC's Vital Enforcement Responsibilities: Hearing Before the Subcomm. On Securities, Insurance, and Investment of the S. Comm. On Banking, Housing, and Urban Affairs*, 111th Cong. 46 (2009) (Statement of Robert Khuzami, Director, SEC) ("[I]f there is a wide gap between conduct and atonement, then the message – to the investing public that the SEC is vigilant and effective, as well as the message to those who might themselves be considering a step outside the law – is diluted. . . . [T]he opportunity to achieve a permanent change in behavior and culture is greatly reduced.").

B. The Decision Below Undermines the Principles of Repose and Certainty

Disgorgement awards generally dwarf the statutory penalties imposed in government enforcement actions. In 2015 alone, the SEC obtained $1.2 billion in civil monetary penalties but an additional $3 billon in disgorgement orders. *See* SEC, *Select SEC and Market Data Fiscal 2015*, 2 (2016).[7] Repose and certainty are accordingly especially important for disgorgement claims because they expose defendants to potentially crippling monetary awards. But the Tenth Circuit's construction of Section 2462 would create a permanent cloud of potential liability over financial market participants. Absent a "fixed date when exposure to Government enforcement efforts ends," businesses, investors, and securities professionals are stripped of the repose that statutes of limitations are designed to provide. *See Gabelli*, 133 S. Ct. at 1221. Such never ending liability would create significant uncertainty for those whose careers, reputations and financial security are at stake.

The Tenth Circuit's ruling would have a destabilizing effect on the efficient functioning of the securities markets by eliminating predictability and undermining the ability of industry participants to act based on reasoned assumptions about the possibility of disgorgement claims and liability. *See Wilson v. Garcia*,

---

[7] The district court here ordered Petitioner to pay a monetary penalty of $2.4 million. That was a small fraction of the disgorgement award of approximately $35 million plus an additional $18 million in prejudgment interest. Pet. App. 45a.

471 U.S. 261, 275 n.34 (1985) ("Defendants cannot calculate their contingent liabilities, not knowing with confidence when their delicts lie in repose."). It has long been recognized that securities law is "an area that demands certainty and predictability." *Pinter v. Dahl*, 486 U.S. 622, 652 (1988). Claims that can be made forever are "not a 'satisfactory basis for a rule of liability imposed on the conduct of business transactions.'" *Cent. Bank of Denver, N.A.*, 511 U.S. at 188 (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 755 (1975)). The uncertainty "can have ripple effects" across the financial markets, "increas[ing] costs incurred by professionals" which then "may be passed on to their client companies, and in turn incurred by the company's investors, the intended beneficiaries of the statute." *Id.* at 189. Such open-ended liability increases the cost of business transactions, making due diligence more difficult and burdening successor corporations with a predecessor's misconduct. *See* Catherine E. Maxson, Note, *SEC Enforcement Suits: The Applicability of Section 2462's Statute of Limitations to SEC Enforcement Suits in Light of the Remedies Act of 1990*, 94 Mich. L. Rev. 512, 529 (1995) ("If SEC enforcement suits could impose staggering fines on corporate entities at any time, the transaction costs of contracting would increase as parties would have to compensate for this risk of liability.").

In contrast, the enforcement of Section 2462 in SEC disgorgement actions, by eliminating "protracted liability," *CTS*, 134 S. Ct. at 2183, adds predictability that serves the important purpose of enabling

financial institutions to deploy for productive use capital that otherwise might be tied up indefinitely in reserves to cover potential liability. It protects new shareholders, bondholders and management from liability for conduct that occurred at a time when they were not associated with the business. And it prevents strategic delay or efforts to seek "recoveries based on the wisdom given by hindsight" and the "volatile" prices of securities. *Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385, 1392 (7th Cir. 1990).

Applying Section 2462's five-year statute of limitations to claims seeking disgorgement serves a vitally important role in the administration of justice and brings stability and certainty to the law. Like the position of the SEC that this Court rejected in *Gabelli*, the ruling below would frustrate the goals of repose and certainty underlying Section 2462. It is vital to the securities industry and financial markets that laws are construed and applied as enacted by Congress and that statutes of limitations are enforced. In the absence of a limitations period for disgorgement, market participants lack the certainty of knowing that at some point their conduct will be free from scrutiny. Businesses and individuals would never be free from potential SEC claims, so long as the SEC labels its sanctions as "equitable."[8]

---

[8] Because Section 2462 is also a default statute of limitations for the government outside the securities context, the impact of the Tenth Circuit's decision extends beyond SEC proceedings.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Tenth Circuit should be reversed.

March 3, 2017

Respectfully submitted,

IRA D. HAMMERMAN
KEVIN M. CARROLL
SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION
1101 New York Avenue, NW
Washington, D.C. 20005
(202) 962-7300

MICHAEL J. DELL
Counsel of Record
ALAN R. FRIEDMAN
ARIELLE WARSHALL KATZ
KRAMER LEVIN NAFTALIS & FRANKEL LLP
1177 Avenue of the Americas
New York, New York 10036
(212) 715-9100
mdell@kramerlevin.com

Counsel for Amicus Curiae Securities Industry and Financial Markets Association

---

For example, it could affect possible claims by the Commodity Futures Trading Commission in the futures and derivatives industry and the Federal Energy Regulatory Commission in the energy industry.

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
MAR - 3 2017
OFFICE OF THE CLERK

No. 16-529

IN THE

Supreme Court of the United States

CHARLES R. KOKESH,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Writ of Certiorari to the U.S. Court of Appeals for the Tenth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Richard A. Samp
(Counsel of Record)
Mark S. Chenoweth
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
202-588-0302
rsamp@wlf.org

Date: March 3, 2017

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Under 28 U.S.C. § 2462, any "action, suit or proceeding for enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued."

The Question Presented is:

Does the five-year statute of limitations in 28 U.S.C. § 2462 apply to claims for "disgorgement"?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES v

INTERESTS OF *AMICUS CURIAE* 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 4

ARGUMENT 8

I. DISGORGEMENT IS A SECTION 2462 "PENALTY" BECAUSE ITS MONETARY SANCTION IS NOT IMPOSED SOLELY, OR EVEN PARTIALLY, FOR THE PURPOSE OF REDRESSING PRIVATE INJURY 8

A. *Gabelli* Confirms the Broad Reach of Section 2462 11

B. The Manner in which SEC Imposes Its Disgorgement Remedy Has All the Hallmarks of a "Penalty" 14

II. THE SEC'S EFFORT TO DISTINGUISH EQUITABLE SANCTIONS FROM PUNITIVE SANCTIONS IS UNAVAILING 17

A. What SEC Now Terms "Disgorgement" Has Never Been Categorized as an Equitable Remedy by this Court 17

Page

B. Disgorgement Is Barred as a Section 2462 "Penalty" Even If It Could Properly Be Termed Equitable Relief 21

C. The SEC's "Equitable" Argument Would Eviscerate Section 2462 22

III. THE COURT SHOULD INTERPRET SECTION 2462 WITHOUT REGARD TO ANY "NARROW CONSTRUCTION" PRESUMPTION 25

CONCLUSION 28

TABLE OF AUTHORITIES

Page(s)

Cases:

3M Company v. Browner,
17 F.3d 1453 (D.C. Cir. 1994) 28
Adams v. Woods,
6 U.S. (2 Cranch) 336 (1805) 7, 27, 28
America Production Co. v. Burton,
549 U.S. 84 (2006) 26
Badaracco v. Comm'r of Internal Revenue,
464 U.S. 386 (1984) 26
Coryell v. Colbaugh,
1 N.J.L. 77 (1791) 16
E.I. Du Pont de Nemours & Co. v. Davis,
264 U.S. 456 (1924) 26
Exxon Shipping Co. v. Baker,
554 U.S. 471 (2008) 16, 24, 25
Feltner v. Columbia Pictures Television, Inc.,
523 U.S. 340 (1998) 18, 20
Gabelli v. SEC,
133 S. Ct. 1216 (2013) ..... *passim*
Guaranty Trust Co. of New York v. United States,
304 U.S. 126 (1938) 26
Halliburton Co. v. Erica P. John Fund, Inc.,
134 S. Ct. 2398 (2014) .....
Huntington v. Attrill,
146 U.S. 657 (1892) 10, 11
Livingston v. Woodworth,
56 U.S. 546 (1854) 21
Meeker v. Lehigh Valley R. Co.,
236 U.S. 412 (1915) 5, 9, 10
Mowry v. Whitney,
81 U.S. 620 (1871) 21
Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund, 135 S. Ct. 1318 (2015) 1

Page(s)

PHH Corp. v. CFPB,
839 F.3d 1 (D.C. Cir. 2016), *vacated and reh. granted*, ___ F.3d ___ (Feb. 16, 2017) 24
Proffitt v. SEC,
200 F.3d 855 (D.C. Cir. 2000) 11
Root v. Lake Shore and Michigan So. Ry. Co.,
105 U.S. 180 (1881) 19, 20
Rotella v. Wood,
528 U.S. 549 (2000) 13
SEC v. Haligiannis,
470 F. Supp. 2d 373 (S.D.N.Y. 2007) 15
SEC v. JT Wallenbrock & Assocs.,
440 F.3d 1109 (9th Cir. 2006) 14
Sheldon v. Metro-Goldwyn Pictures Corp. ,
309 U.S. 390 (1940) 17, 18, 20
Suffolk Co. v. Hayden,
70 U.S. 315 (1865) 20
Timbervest LLC v. SEC,
Case No. 151416 (dec. pending, D.C. Cir.) 1
United States v. Whited & Wheless, Ltd.,
246 U.S. 552 (1918) 26
Wood v. Carpenter,
101 U.S. 135 (1879) 23
Yates v. United States,
135 S.. Ct. 1074 (20165 9

Page(s)

Statutes and Constitutional Provisions:

U.S. Const., amend. VII 18

Act of Feb. 28, 1839, ch. 36, § 4, 5 Stat. 322 (1839) 8

Investment Company Act of 1940, § 37, 15 U.S.C. § 80a-36 8

15 U.S.C. § 78u(d)(5) 3

28 U.S.C. § 2462 ..... *passim*

Rev. Stat. § 1047, Comp. Stat. 1913, § 1712 10

Miscellaneous:

SEC, Select SEC and Market Data, 2011 23

SEC, Select SEC and Market Data, 2015 23

Webster's Third New International Dictionary (1976) 9

INTERESTS OF *AMICUS CURIAE*

Washington Legal Foundation (WLF) is a non-profit public interest law firm and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law.

To that end, WLF has regularly appeared before this Court and other federal courts in numerous cases related to the proper scope of the federal securities laws. *See, e.g., Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318 (2015); *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014). In particular, WLF has participated in litigation regarding the applicability of 28 U.S.C. § 2462's five-year limitations period to enforcement actions filed by the Securities and Exchange Commission (SEC). *See, e.g., Timbervest LLC v. SEC*, Case No. 15-1416 (dec. pending, D.C. Circuit).

WLF is concerned by SEC's willingness to pursue enforcement actions many years after the events giving rise to those actions occurred. Congress has established a five-year limitations period for the enforcement of any civil fine, penalty, or forfeiture by SEC and other federal agencies. Nonetheless, SEC over the past several decades has raised a series of arguments regarding why that statute of limitations

---

[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing; letters of consent have been lodged with the Court.

imposes virtually no constraints on its enforcement authority. WLF fears that if the Court accepts SEC's arguments in this case, the five-year statute of limitations will be rendered a nullity.

WLF agrees with Petitioner that the disgorgement order SEC issued in this case is both a "penalty" and a "forfeiture," within the meaning of 28 U.S.C. § 2462. This brief focuses on the "penalty" issue.

STATEMENT OF THE CASE

The disgorgement order at issue in this case arose in connection with an SEC enforcement action filed against Petitioner Charles Kokesh in 2009. The SEC charged that Kokesh, between 1991 and 2007, misappropriated funds from four SEC-registered business development companies in violation of federal securities laws. Following a jury verdict in SEC's favor, the district court entered judgment against Kokesh in March 2015. Pet. App. 20a-47a. The final judgment: (1) permanently enjoined Kokesh from violating certain provisions of the securities laws; (2) imposed a civil fine of $2.4 million; (3) ordered Kokesh to disgorge $34.9 million (which the court said "reasonably approximates the ill-gotten gains causally connected to Defendant's violations"); and (4) ordered Kokesh to pay $18.1 million in prejudgment interest. *Id.* at 46a.

The district judge held that § 2462—the five-year limitations period—applied to SEC's imposition of a civil fine, and he thus based his fine calculation solely on Kokesh's activities during the five years

immediately prior to SEC's 2009 filing. *Id.* at 25a-32a. He held, however, that § 2462 was inapplicable to the SEC's request for disgorgement of ill-gotten gains because, he concluded, disgorgement is not a "penalty" within the meaning of § 2462. *Id.* at 41a-44a. He stated that a $34.9 million disgorgement order was appropriate because it "reasonably approximate[d]" the amount of funds that Kokesh misappropriated between 1991 and 2007, although he noted that many of the funds in question were not transferred to Kokesh or related entities. *Id.* at 43a-45a. The judge deemed it proper to base disgorgement on the total amount of misappropriated funds—not simply Kokesh's net profit from his activities—because doing so would "deter others' violations of the securities laws." *Id.* at 43a.

The Tenth Circuit affirmed. Pet. App. 1a-19a. It held that disgorgement was neither a "penalty" nor a "forfeiture" within the meaning of § 2462 and thus that the five-year limitations period did not bar a disgorgement order for pre-2004 activities. *Id.* at 10a-16a. It stated that "disgorgement is not a penalty under § 2462 because it is remedial" and "does not inflict punishment." *Id.* at 10a-11a. The Court stated, "To be sure, disgorgement serves a deterrent purpose, but it does so only by depriving the wrongdoer of the benefits of wrongdoing." *Id.* at 11a. It categorized disgorgement as "equitable relief" and noted that federal law authorizes courts to grant equitable relief sought by SEC. *Id.* at 10a (citing 15 U.S.C. § 78u(d)(5)).

The appeals court concluded that the disgorgement order was not rendered "punitive" simply because Kokesh was "being required to disgorge more

than he actually gained himself." *Id.* at 12a. It explained, "[T]here is nothing punitive about requiring a wrongdoer to pay all the funds he caused to be improperly diverted to others as well as to himself." *Ibid.*

The appeals court stated that its decision was informed by a presumption that statutes of limitation are to be strictly construed when applied against the federal government:

> Statutes of limitations are interpreted narrowly in the government's favor to protect the public from the negligence of public officers in failing to timely file claims in favor of the public's interest. ... And we have recognized that equitable claims are usually not subject to statutes of limitations.

Id. at 6a (citation omitted).

SUMMARY OF ARGUMENT

The SEC conceded that it filed its enforcement action against Kokesh more than five years after most of the events giving rise to the proceedings. A federal statute bars any SEC "action, suit, or proceeding for the enforcement of any civil fine, penalty, or forfeiture," unless it is commenced within five years of the date on which its claims "first accrued." 28 U.S.C. § 2462. Those claims accrued at the time the alleged misconduct occurred. *Gabelli v. SEC*, 133 S. Ct. 1216, 1220-21 (2013). Because the disgorgement ordered by the district court is properly classified as a "penalty,"

§ 2462 bars disgorgement of any funds allegedly misappropriated more than five years before October 27, 2009 (the date on which SEC filed suit).

More than a century ago, the Court provided guidance regarding when a civil sanction should be deemed a penalty or forfeiture for purposes of § 2462's predecessor:

> The words "penalty or forfeiture" in this section refer to something imposed in a punitive way for an infraction of a public law, and do not include a liability imposed solely for the purpose of redressing a private injury, even though the wrongful act be a public offense, and punishable as such.

Meeker v. Lehigh Valley R. Co., 236 U.S. 412, 423 (1915). It is uncontested that no portion of the disgorgement order sought by SEC and granted by the district court was imposed "for the purpose of redressing a private injury." Accordingly, that sanction qualifies as a "penalty" within the meaning of § 2462.

The Court recently reiterated the broad scope of § 2462 in *Gabelli*, which rejected SEC's efforts to apply a "discovery rule" to § 2462, such that an SEC claim would not accrue until the Commission "discovers" its cause of action. The Court ruled instead that an SEC claim "accrues when it comes into existence." *Id.* at 1220. It explained that its reading of "accrued" advances the "basic policies" of all statutes of limitations by setting a "fixed date" after which the threat of SEC enforcement ends, and thereby provides

defendants with repose and certainty about their potential liability. *Ibid.*

In disputing Kokesh's § 2462 defense, SEC argues that its disgorgement remedy is "equitable," not "punitive," in nature. That argument lacks merit. What SEC terms "disgorgement"—a remedy that SEC only recently began requesting in enforcement actions and that is not designed to provide restitution to anyone injured by Kokesh's conduct—has never been categorized as an equitable remedy by this Court. The historical antecedents to which SEC points involve efforts by equity courts to provide restitution to individuals identified as having been injured by the defendants' activities.

The disgorgement order imposed on Kokesh can only be viewed as an effort to punish him. The Tenth Circuit concluded that the order did not impose a penalty because "[d]isgorgement just leaves the wrongdoer in the position he would have occupied had there been no misconduct." Pet. App. 11a. But under what circumstances would the government ever seek to disgorge funds from a private individual and keep them for itself? The appeals court's own words provide the ready answer: when the government determines that the individual deserves to be sanctioned because he is a "wrongdoer" who has engaged in "misconduct." Imposing a civil judgment because an individual has engaged in "misconduct" and because the government seeks to prevent him from profiting by his misconduct fits comfortably within any commonly understood definition of "penalty." The appeals court's recognition that "disgorgement serves a deterrent purpose," *ibid*, only strengthens that conclusion; deterrence of future

wrongdoing is one of the principal reasons why governments impose penalties.

Moreover, adopting SEC's argument would eviscerate § 2462. The statute of limitations would cease to exist if SEC could avoid the limitations of § 2462 any time it articulated an "equitable" rationale for imposing sanctions, and (as this case well illustrates) SEC has little difficulty concocting such rationales. Indeed, now that *Gabelli* has taken a major weapon out of SEC's arsenal—by preventing use of a discovery rule to extend the § 2462 limitations period—SEC seeks disgorgement in virtually *all* of its enforcement actions.

Finally, the Court should construe § 2462 without placing a thumb on SEC's side of the scale, as the Tenth Circuit did. This Court has never cited the narrow-construction-of-statutes-of-limitations maxim in cases in which, as in *Gabelli*, it addressed a statute-of-limitations issue in the context of a government enforcement action. Indeed, *Gabelli* cited another maxim, older still, a maxim specifically relating to actions for penalties and that points in the opposite direction: "'It would be utterly repugnant to the genius of our laws' if actions for penalties could 'be brought at any distance of time.'" 133 S. Ct. at 1223 (quoting *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 342 (1805) (Marshall, C.J.)).

ARGUMENT

I. DISGORGEMENT IS A SECTION 2462 "PENALTY" BECAUSE ITS MONETARY SANCTION IS NOT IMPOSED SOLELY, OR EVEN PARTIALLY, FOR THE PURPOSE OF REDRESSING PRIVATE INJURY

The SEC's enforcement action against Kokesh sought sanctions against him for alleged violations of, *inter alia*, § 37 of the Investment Company Act of 1940, 15 U.S.C. § 80a-36. The SEC alleged that he knowingly and willfully converted investment-company assets to his own use or to the use of another. Because the Act lacks a statute-specific limitations period, SEC proceedings under the Act are subject to the five-year statute of limitations imposed by 28 U.S.C. § 2462 on all proceedings "for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise."[2] *Gabelli*, 133 S. Ct. at 1219. Because the disgorgement sanction SEC seeks to impose against Kokesh qualifies as a "penalty," it is largely time-barred. Of the $34.9

---

[2] The statute provides:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

28 U.S.C. § 2462. The statute's origins date back to at least 1839, and its wording has been unchanged since 1948. *See* Act of Feb. 28, 1839, ch. 36, § 4, 5 Stat. 322.

million disgorgement sanction, only $4 million relates to activities that occurred within five years of SEC's 2009 filing.

Ordinarily, a word's usage in a statute "accords with its dictionary definition." *Yates v. United States*, 135 S. Ct. 1074, 1082 (2015). In common usage, a "penalty" is "the suffering in person, rights, or property which is annexed by law or judicial decision to the commission of a crime or public offense." *Webster's Third New International Dictionary* 1668 (1976). The disgorgement sanction imposed on Kokesh fits comfortably within that definition. The $34.9 million sanction (plus prejudgment interest) imposes "suffering" and "punishment" on Kokesh as a consequence of his alleged violations of the Investment Company Act of 1940.

In construing § 2462 and its predecessor statutes, the Court has sought to distinguish between sanctions designed to punish the defendant and sanctions whose principal purpose is to provide compensation for individuals injured by the defendant's conduct. The former are "penalties" subject to § 2462's five-year limitations period; the latter are not:

> The words "penalty or forfeiture" in this section refer to something imposed in a punitive way for an infraction of a public law, and do not include a liability imposed solely for the purpose of redressing a private injury, even though the wrongful act be a public offense, and punishable as such.

Meeker, 236 U.S. at 423.[3] It is undisputed that none of the disgorgement sanction imposed on Kokesh is designed to provide compensation to anyone who may have been injured by his alleged misconduct. Accordingly, the disgorgement qualifies as a "penalty" (as well as a "forfeiture") within the meaning of § 2462.

Meeker's definition of "penalty" aligns with the definition adopted by the Court in other contexts. For example, in a 19th-century decision that addressed when a judgment in a state court should be deemed "penal" for purposes of the Full Faith and Credit Clause, the Court explained that "[p]enal laws, strictly and properly, are those imposing punishment for an offense committed against the state. ... The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual." *Huntington v. Attrill*, 146 U.S. 657, 667-68 (1982). In further explanation, the Court stated that the question of whether a law is penal depends on whether its purpose "is to punish an offense against the public justice of the State, or to afford a private remedy to a person injured by the wrong." *Id.* at 673-74.[4] The

---

[3] *Meeker* held that sanctions imposed by the Interstate Commerce Commission against a railroad did not constitute a "penalty or forfeiture" within the meaning of the predecessor of § 2462—Rev. Stat. § 1047, Comp. Stat. 1913, § 1712—because the sanctions were designed to provide compensation to a company that the railroad had overcharged for shipping coal. *Id.* at 423.

[4] The Court concluded that the New York statute in question was not "penal" because it was designed to provide compensation to creditors of underfunded corporations, not to

Court relied on *Huntington* in construing the meaning of "penalty" as used in § 2462's predecessor. *See Meeker*, 236 U.S. at 423.

The D.C. Circuit has adopted that same definition of a § 2462 "penalty": "a sanction used to punish an individual for unlawful or proscribed conduct, going beyond compensation of the wronged party." *Proffitt v. FDIC*, 200 F.3d 855, 860 (D.C. Cir. 2000) (citations omitted). Because SEC waited more than five years before initiating proceedings for the purpose of imposing a disgorgement sanction on Kokesh that went "beyond compensation of the wronged party," the sanction is time-barred to the extent that it relies on events pre-dating October 2004.

A. *Gabelli* Confirms the Broad Reach of Section 2462

The SEC has long chafed at what it views as § 2462's overly restrictive limitations period. But rather than approaching Congress to amend the statute, it has urged courts to adopt a variety of measures designed to lengthen the limitations period. In particular, over the past several decades it has urged courts to adopt a "discovery" rule, under which § 2462's limitations period would not accrue until SEC discovers, or with reasonable diligence should have discovered, the defendants' violations of the securities laws.

---

punish an alleged wrongdoer. *Id.* at 676-77.

In *Gabelli*, the Supreme Court unanimously declined to adopt a discovery rule, holding instead that the § 2462 limitations period begins to run against SEC as soon as the defendant completes the actions alleged to have violated the securities law. 133 S. Ct. at 1216. In rejecting SEC's efforts to narrow the scope of § 2462, the Court repeatedly emphasized the broad reach of the statute of limitations. While the Court did not directly address § 2462's definition of a "penalty," language in the decision confirms *Meeker*'s holding that the "penalty" analysis should focus on whether SEC's sanctions go beyond remedying the damage caused to the harmed parties by the defendant's action.

For example, in rejecting SEC's request for adoption of a discovery rule, the Court explained, "We have never applied the discovery rule in this context where the plaintiff is not a defrauded victim seeking recompense." *Id.* at 1221. The Court distinguished statutes cited by SEC as examples of a discovery rule being applied to lawsuits filed by the government, noting that "in many of those instances, the Government is itself an injured victim looking for recompense, not a prosecutor seeking penalties." *Id.* at 1224. In other words, the Court was unwilling to relax the limitations imposed by § 2462 when the suit is one designed primarily to impose sanctions on the defendant, not to provide recompense for those injured by the defendant's conduct.[5]

---

[5] The Court noted that "[t]he discovery rule helps to ensure that the injured receive recompense." *Id.* at 1223. But, the Court explained, "this case involves penalties, which go beyond compensation, are intended to punish, and label defendants

Gabelli also rejected a discovery rule because it determined that establishing a "fixed date" after which government enforcement efforts would be time-barred best served the purposes of statutes of limitations:

> This reading sets a fixed date when exposure to the specified Government enforcement efforts ends, advancing "the basic policies of all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities."

Id. at 1221 (quoting *Rotella v. Wood*, 528 U.S. 549, 555 (2000)). The Court added that it has "deemed [statutes of limitations] vital to the welfare of society ... and concluded that even wrongdoers are entitled to assume that their sins may be forgotten." *Ibid* (citations omitted). That language is an implicit rejection of the SEC's approach in this case. By asserting that the overwhelming majority of its regularly employed sanctions is not subject to § 2462 without regard to whether those sanctions provide recompense to victims—and thus is not subject to *any* statute of limitations—SEC undercuts the purposes that, according to *Gabelli*, § 2462 serves.

---

wrongdoers." *Ibid* (citing *Meeker*, 236 U.S. at 423).

B. The Manner in which SEC Imposes Its Disgorgement Remedy Has All the Hallmarks of a "Penalty"

That SEC's disgorgement remedy is a § 2462 "penalty" is further confirmed by the manner in which SEC has sought to apply it and the manner in which the Tenth Circuit and other federal appeals courts have enforced it.

In particular, SEC disclaims any interest in limiting disgorgement to the amount of profit that the defendant derived from his wrongdoing. Rather than simply attempting to disgorge funds for the purpose of placing Kokesh and other defendants in the same financial position they would have occupied but for their wrongdoing, SEC unabashedly claims the right to a monetary judgment that encompasses *all* funds misappropriated by wrongdoers—without regard to whether those funds represent profits and even without regard to whether the funds were ever received by the wrongdoer or affiliated entities.

The Tenth Circuit denied that such supra-profit sanctions constituted evidence that the disgorgement order in this case constituted a § 2462 "penalty." Pet. App. 12a-13a. The court asserted that imposing such sanctions is just: "it would be unjust to permit the defendants to offset against the investor dollars they received the expenses of running the very business they created to defraud those investors into giving the defendants the money in the first place." *Id.* at 12a (quoting *SEC v. JT Wallenbrock & Assocs.*, 440 F.3d 1109, 1114-15 (9th Cir. 2006)). But regardless whether

such sanctions are "just," one cannot plausibly argue that they are being imposed for the purpose of returning Kokesh to the financial position he would have occupied had no investor funds been misappropriated. Imposing supra-profit sanctions that place Kokesh in a far worse financial position, on the ground that justice requires that those guilty of fraud be treated in this manner, can only be described as subjecting him to a "penalty."

Moreover, SEC repeatedly asserts that normal evidentiary burdens should not apply to its efforts to calculate the proper size of the disgorgement judgment. It justifies that lightened evidentiary burden by pointing to the defendant's demonstrated status as a wrongdoer. The district court in this case agreed and awarded $34.9 million in disgorgement based on its conclusion that wrongdoers like Kokesh are not entitled to insist on normal evidentiary standards:

> When the Court is calculating the proper amount of disgorgement for violation of securities laws, it need not make "an exact calculation of the defendant's profits, but only a reasonable approximation of profits causally connected to the violation. Because such calculations are not capable of exactitude, any risk of uncertainty in calculating disgorgement *should fall on the wrongdoer whose illegal conduct created that uncertainty.*"

Pet. App. 44a (quoting *SEC v. Haligiannis*, 470 F.

Supp. 2d 373, 384 (S.D.N.Y. 2007)) (emphasis added). The district court stated that $34.9 million "*reasonably approximates* the ill-gotten gains causally connected to [Kokesh's] violations." *Id.* at 45a (emphasis added).

WLF does not dispute that it may be appropriate, in some circumstances, for courts to apply a relaxed evidentiary standard to SEC efforts to demonstrate the size of the sanction to be imposed on one found to have violated the securities laws. But a decision to apply a relaxed evidentiary standard because "any risk of uncertainty in calculating disgorgement should fall on the wrongdoer whose illegal conduct created that uncertainty" *penalizes* a defendant because of his wrongdoing.

Finally, WLF notes that both the Tenth Circuit and the district court recognized that one purpose of imposing a disgorgement remedy on securities-law violators is to deter others' violations of the securities laws. Pet. App. 11a, 43a. Deterrence is one of the principal reasons why governments impose penalties. For example, the Court has explained that punitive damages historically have been awarded as a "punishment" for the defendant "to prevent such offences in the future." *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008) (quoting *Coryell v. Colbaugh*, 1 N.J.L. 77 (1791)). Imposing a disgorgement remedy in order to deter future misconduct and not solely for the purpose of restitution to those injured by the defendant's misconduct has all the hallmarks of a "penalty," as that term is commonly understood.

II. THE SEC'S EFFORT TO DISTINGUISH EQUITABLE SANCTIONS FROM PUNITIVE SANCTIONS IS UNAVAILING

The SEC has repeatedly argued that disgorgement is not a § 2462 "penalty" because it is properly categorized as an "equitable" remedy that lacks punitive intent. *See, e.g.* Opp. Cert. at 8. The Tenth Circuit cited the equitable-remedy argument in affirming the district court judgment. Pet. App. 10a. That reliance on equitable principles fails to demonstrate § 2462's inapplicability—both because it misreads legal history (the disgorgement sought by SEC has never been deemed an equitable remedy) and because it wrongly presumes that Congress would choose not to apply its § 2462 limitations period to an equitable remedy that is punitive in nature. Moreover, accepting SEC's equitable-remedy argument would eviscerate § 2462; it would permit SEC to seek a disgorgement remedy based on conduct that occurred decades in the past.

A. What SEC Now Terms "Disgorgement" Has Never Been Categorized as an Equitable Remedy by this Court

The SEC contends that "disgorgement is relief 'given in accordance with principles governing equity jurisdiction'" and that "its purpose is 'not to inflict punishment but to prevent unjust enrichment.'" Opp. Cert. at 8 (quoting *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, 399 (1940)). It cites the following quotation from a later Court decision raising Seventh

Amendment right-to-jury-trial issues: "[W]e have characterized as equitable ... actions for disgorgement of improper profits." *Ibid* (quoting *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 352 (1998)).

The SEC citations are misleading because those cases refer to a "disgorgement" remedy quite unlike the remedy sought by SEC in recent decades. The disgorgement remedy referenced by the Court is a form of restitution: in some instances, equity courts deemed it fair to order a defendant found to have infringed another's patent or copyright to disgorge the profits generated by his infringement and to pay them to the injured plaintiff, who was deemed the rightful owner of those profits. As explained above, the "disgorgement" sought by SEC in recent decades is of a far different nature. It seeks disgorgement from securities-law violators (to the Government, not to victims) because it deems it unjust to permit violators to be enriched by their wrongdoing. Thus, *Sheldon*'s statement that disgorgement is a remedy whose purpose "is not to inflict punishment" is irrelevant to this case because it was referring to a remedy far afield from the disgorgement remedy SEC now seeks.

Throughout American legal history, whether a remedy was classified as legal or equitable had particular significance in the fields of patent and copyright law. Before the merger of law and equity in the 20th century, patentees and copyright owners faced a difficult choice in deciding whether to proceed against infringers at law or in equity. If they were most interested in enjoining future infringement, they would proceed in equity because injunctive relief was

available only in equity, not in courts of law. But throughout most of the 19th century (until 1870 in the case of patents, 1909 in the case of copyrights), damages were unavailable in equitable actions filed against infringers; so a second lawsuit was required to recover damages for past infringement. *See Root v. Lake Shore and Michigan So. Ry. Co.*, 105 U.S. 189, 201 (1881)

Federal courts were sympathetic to this dilemma and thus permitted plaintiffs proceeding in equity to seek "equitable" monetary remedies (referred to as an "accounting") in addition to injunctive relief. The courts permitted patentees and copyright owners to recover in equity the net profit that the defendant earned as a result of his infringement, as a substitute for the damages they might have been awarded in an action at law. In an 1881 patent-law decision, this Court explained that once a federal court acquired jurisdiction to consider a grant of injunctive relief, it could "retain the cause for the sake of administering an entire remedy and complete justice, rather than send him to a court of law for redress in a second action." *Root*, 105 U.S. at 214. The Court elaborated:

> The rule adopted was that which the court in fact applies in cases of trustees who have committed breaches of trust by an unlawful use of trust property for their own advantage; that is, to require them to refund the amount of profit which they have actually realized. This rule was adopted, not for the purpose of acquiring jurisdiction, but, in cases where, having

> jurisdiction to grant equitable relief, the court was not permitted by the principles and practice in equity to award damages in the sense in which the law gives them, but a substitute for damages, for the purpose of preventing multiplicity of suits.

Id. at 214-15.

Both *Sheldon* and *Feltner*, the decisions on which SEC relies, were copyright cases. The "disgorgement" relief referenced in those decisions is the relief described in *Root*: a restitution award in equity to a patentee or copyright holder (consisting of the profits earned by the defendant as a result of his infringement) in lieu of the damages he might have recovered in an action at law.[6] That disgorgement

---

[6] Nineteenth century courts recognized a rough equivalence between the equitable monetary remedy (disgorgement of the net profit earned by the defendant as a result of his infringement) and damages at law (awarded for losses suffered by the patentee or copyright holder as a result of the infringement). Indeed, in actions at law, this Court routinely recognized that the amount of the infringer's unjust profit could properly be used as evidence of the *plaintiff's* lost profits. *See, e.g., Suffolk Co. v. Hayden*, 70 U.S. 315, 320 (1865) ("And what evidence could be more appropriate and pertinent [in assessing damages] than that of the utility and advantage of invention over the old modes or devices that had been used for working out similar results? With a knowledge of these benefits to the persons who have used the invention, and the extent of the use by the infringer, a jury will be in possession of material and controlling facts that may enable them, in the exercise of a sound judgment, to ascertain the damages, or in other words, the losses to the patentee or owner

relief is far afield from the disgorgement SEC seeks, which would disgorge profits from a wrongdoer not for the purpose of compensating an injured plaintiff but for the purpose of ensuring that the defendant is not "unjustly enriched" by his wrongdoing. Historically, courts in equity did not recognize the relief SEC seeks.

The stark contrast between the equitable relief recognized by 19th-century equity courts and the disgorgement relief SEC seeks is all the greater given SEC's refusal to limit disgorgement to a wrongdoer's net profits. Nineteenth-century equity courts consistently refused to grant monetary relief that exceeded the infringer's net profits derived directly from the infringement, even when the plaintiff presented evidence that his losses far exceeded those net profits or that the defendant could have earned much more from his infringement if he had operated his business more efficiently. *See, e.g., Livingston v. Woodworth*, 56 U.S. 546, 560 (1854) (injured claimants are entitled to claim the defendant's net profits derived from the infringement, "that which ... is theirs, and nothing beyond this"); *Mowry v. Whitney*, 81 U.S. 620, 650 (1871).

B. Disgorgement Is Barred as a Section 2462 "Penalty" Even If It Could Properly Be Termed Equitable Relief

The SEC's equitable-remedy argument is unavailing for the additional reason that it fails to

---

by the piracy instead of the purchase of the use of the invention.").

address the language of § 2462, which imposes a five-year limitations period on actions to enforce a "civil fine, penalty, or forfeiture." If the disgorgement relief sought by the SEC is a "penalty" within the meaning of that statute—and it is, for all the reasons cited above—it is irrelevant whether that relief was available historically from courts of equity.

Nothing in the language of § 2462 suggests that Congress was imposing a limit on remedies available in legal actions but not on equitable remedies. The SEC has cited no 19th-century case law in which the government sued in equity for injunctive relief and also sought "equitable" monetary relief, let alone an action of that sort in which the predecessor to § 2462 was deemed inapplicable. In sum, even if SEC's equitable-remedy argument were historically accurate, it would add nothing to the statutory-interpretation issue before the Court.

C. The SEC's "Equitable" Argument Would Eviscerate Section 2462

The SEC's interpretation of § 2462 should be rejected for the additional reason that it would virtually eliminate all limits on the Commission's power to reach back in time to prosecute long-ago alleged violations of the securities laws.

The statute of limitations would cease to exist if SEC could avoid § 2462 limitations any time it articulated an "equitable" rationale for imposing sanctions, and (as this case well illustrates) SEC has little difficulty concocting such rationales. In the years

since the Court decided *Gabelli*, SEC has come to rely increasingly on disgorgement claims to extract monetary payments from the regulated community, and many of those claims stretched back far more than five years. From 2011 to 2015, the annual monetary penalties collected by the SEC remained flat, while the annual disgorgement awards increased 60% during that same period, to more than $3 billion in 2015. The 2015 disgorgement awards were nearly double the 2015 penalty awards. *Compare* SEC, Select SEC and Market Data, Fiscal 2011 *with* SEC, Select SEC and Market Data, Fiscal 2015.

As *Gabelli* recognized, statutes of limitations are "vital to the welfare of society." 133 S. Ct. at 1221. They provide "security and stability to human affairs," *Wood v. Carpenter*, 101 U.S. 135, 139 (1879), without which society cannot function effectively. In adopting § 2462, Congress determined that, although enforcement of the securities law is an important societal goal, citizens should be permitted to arrange their affairs secure in the knowledge that securities transactions in which they engaged more than five years ago will not suddenly give rise to unanticipated civil fines, penalties, or forfeitures. That security will be all but eliminated if SEC prevails in this matter.

The SEC's efforts to thwart § 2462 are particularly worrisome because they create the danger of arbitrary enforcement. By lifting virtually all constraints regarding how far back SEC can reach to impose monetary sanctions, the Tenth Circuit has granted the Commission extraordinary discretion regarding whom to target and whether to seek to

bankrupt those targeted.[7] The SEC may attempt to assure the Court that it will use its new-found power responsibly. But as a D.C. Circuit panel recently responded to similar assurances from the Consumer Financial Protection Bureau, "'trust us' is ordinarily not good enough." *PHH Corp. v. CFPB*, 839 F.3d 1, 55 (D.C. Cir. 2016), *vacated and reh. granted*, ___ F.3d ___ (Feb. 16, 2017).[8]

In the context of punitive damages, the Court has identified the *unpredictability* of penalties as particularly worrisome and as calling into question the fairness of the legal system:

> [A] penalty should be reasonably predictable in its severity, so that even Justice Holmes's "bad man" can look ahead with some ability to know what the stakes are in choosing one course of action or another. ... And when the bad man's counterparts turn up from time to time, the penalty scheme they face ought

---

[7] Lifting those constraints also grants SEC tremendous leverage to force settlements. Few SEC targets can afford to resist settlement pressures, even if they believe that SEC's charges are unwarranted, when the alternative is to go to trial and thereby risk incurring the huge "disgorgement" sanctions (covering transactions dating back decades) that SEC often seeks to assess.

[8] In rejecting CFPB's claim that no limitations period applied to Bureau enforcement proceedings, the panel stated, "This Court looks askance ... at the idea that the CFPB is free to pursue an administrative enforcement action for an indefinite period of time after the relevant conduct took place." *Ibid.*

> to threaten them with a fair probability of suffering in like degree when they wreak like damages.

Exxon Shipping, 554 U.S. at 502. Were it to grant SEC virtually unlimited authority to reach back in time, the Court would exacerbate the unpredictability problem—particularly in light of the tendency of some federal agencies to base their enforcement decisions on newly minted interpretations of existing federal law.

In sum, SEC's position—that imposing a monetary sanction equal to the funds misappropriated by the defendant is "equitable" and thus not subject to § 2462 limitations—should be rejected because it would eliminate virtually all temporal limits on SEC's authority and provide SEC with largely unfettered enforcement discretion.

III. THE COURT SHOULD INTERPRET SECTION 2462 WITHOUT REGARD TO ANY "NARROW CONSTRUCTION" PRESUMPTION

In interpreting § 2462, the Tenth Circuit may have been led astray by its inappropriate invocation of a "narrow construction" canon. It stated, "Statutes of limitations are to be interpreted narrowly in the government's favor," Pet. App. 6a, and then proceeded to construe § 2462 in the government's favor.

There is no evidence that Congress intended § 2462 to be read narrowly, and there is no basis for construing it in a manner other than in accord with the natural meaning of the statutory language.

While this Court has occasionally cited the "narrow construction" presumption, it has done so exclusively in cases in which some proprietary government interest was at stake. *See, e.g., BP America Production Co. v. Burton*, 549 U.S. 84, 95 (2006) (royalties for oil and gas production on federal land); *Badaracco v. Comm'r of Internal Revenue*, 464 U.S. 386 (1984) (suit to recover unpaid federal income tax); *E. I. Du Pont de Nemours & Co. v. Davis*, 264 U.S. 456, 462 (1924) (collection of unpaid shipping fees on government-operated railroad); *United States v. Whited & Wheless, Ltd.*, 246 U.S. 552, 561 (1918) (recovery of fraudulently procured government land). It has never been cited in a case in which the government was exercising its enforcement authority. For example, the Court did not cite it when construing § 2462 against SEC in *Gabelli*.

The Court's expressed rationale for the presumption indicates that it is inapplicable to enforcement actions. The Court explained in *Guaranty Trust Co. of New York v. United States*, 304 U.S. 126, 132 (1938) that "[t]he true reason [for the presumption] is to be found in the great public policy of preserving public rights, revenues, and property from injury and loss, by the negligence of public officers." That rationale could explain the application of the presumption when (as in the cases cited above) the Government's proprietary interests are at stake. But when, as here, SEC is not suing to "preserv[e] public rights, revenues, [or] property," when the Government is simply attempting to enforce the laws with respect to long-ago events, and when there is no question of "negligence of public officers," there is no reason to

construe § 2462 in a biased manner.

Moreover, it makes little sense to construe a statute of limitations in favor of the federal government when, as with § 2462, the only possible plaintiff is the federal government (or a private attorney general acting pursuant to a citizen-suit provision). In the great majority of the cases in which the Court has cited the narrow-construction presumption, the statute of limitations at issue applied to a wide array of potential plaintiffs; thus, it was at least plausible that Congress intended the statute to apply more narrowly when the United States was the plaintiff. But § 2462 *only* applies when the United States (or its surrogate) is filing suit. Under those circumstances, one would expect Congress, if it had intended the statute to apply narrowly, to include narrowing language in the statute and not to rely on courts to do the narrowing for it.

Finally, whatever force the narrow-construction maxim may have, it is more than counterbalanced by a maxim that runs in the opposite direction and is directly applicable to Government enforcement actions. *Gabelli* cited that maxim, as announced by Chief Justice John Marshall: "'It would be utterly repugnant to the genius of our laws' if actions for penalties could 'be brought at any distance of time.'" 133 S. Ct. at 1223 (quoting *Adams v. Woods*, 6 U.S. at 342 (Marshall, C.J.)). The D.C. Circuit also cited *Adams* in a decision that expressly rejected application of the narrow-construction maxim and held (contrary to a position then espoused by SEC) that § 2462 imposed a five-year limitations period for administrative enforcement

actions filed by federal agencies:

> In a country where not even treason can be prosecuted, after a lapse of three years, it could scarcely be supposed, that an individual would remain forever liable to a pecuniary forfeiture.

3M Co. v. Browner, 17 F.3d 1453, 1457 (D.C. Cir. 1994) (quoting *Adams*, 6 U.S. at 341).

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

Richard A. Samp
(Counsel of Record)
Mark S. Chenoweth
Washington Legal Found.
2009 Massachusetts Ave., NW
Washington, DC 20036
202-588-0302
rsamp@wlf.org

March 3, 2017